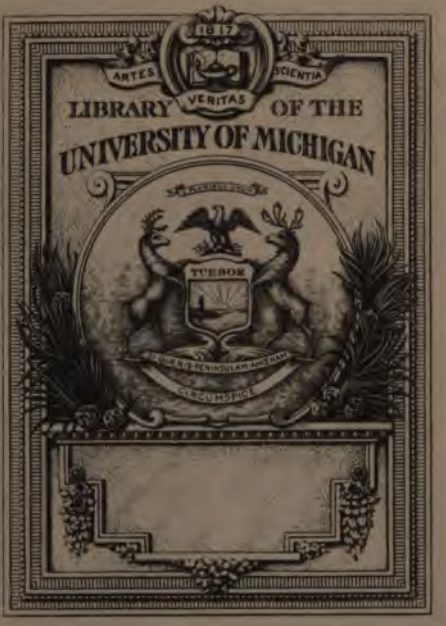

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BY

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FROM THE THIRD ENGLISH EDITION,

REVISED, CORRECTED, AND ENLARGED BY THE AUTHOR.

WITH NOTES AND ADDITIONAL ILLUSTRATIONS,
CHIEFLY FROM AMERICAN CASES,

BY JOHN WILDER MAY,

EX-DISTRICT ATTORNEY FOR SUFFOLK, MASS.

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EDITOR'S NOTICE.

THIS third English edition has been carefully revised, corrected to a considerable extent, changed in its arrangement, and, to some extent, enlarged by the addition of new matter by the author in the light of the criticisms made upon the first and second editions, and his reflections thereupon. The purpose of the editor has been to adapt the work to the use of the American student and lawyer. To this end he has briefly noticed those points in which the American authorities differ, both amongst themselves and from the English authorities. To some extent, he has added new illustrations from American cases, which seemed to him to be sufficiently apt to warrant their insertion; though he has generally preferred, rather than to swell the size of the volume, to refer to those sections of Greenleaf from which, through Mr. Taylor, the illustrations selected by the author have been to a considerable extent taken. In the sections of Greenleaf thus referred to will be found numerous cases, both English and American, as pertinently illustrative of the author's propositions as most of those selected. For greater convenience, the cases cited by the editor — nearly or quite equal in number to those cited by the author — have been incorporated in the same Table.

J. W. M.

BOSTON, October, 1877.

CONTENTS.

INTRODUCTION . . . . . Page 1–17
PREFACE TO THE THIRD EDITION 19–33

PART I.

RELEVANCY.

CHAPTER I.

PRELIMINARY.

ART. 1. Definition of Terms 35–40

CHAPTER II.

OF FACTS IN ISSUE AND RELEVANT TO THE ISSUE.

ART. 2. Facts in issue and Facts relevant to the issue may be proved — 3. Relevancy of Facts forming part of the same transaction as Facts in issue — 4. Acts of Conspirators — 5. Title — 6. Customs — 7. Motive, preparation, subsequent conduct, explanatory statements — 8. Statements accompanying acts, complaints, statements in presence of a person — 9. Facts necessary to explain or introduce relevant Facts 41–54

CHAPTER III.

OCCURRENCES SIMILAR TO BUT UNCONNECTED WITH THE FACTS IN ISSUE, IRRELEVANT EXCEPT IN CERTAIN CASES.

ART. 10. Similar but unconnected Facts — 11. Acts showing intention, good faith, &c. — 12. Facts showing system — 13. Existence of course of business when deemed to be relevant 55–63

CHAPTER IV.

HEARSAY IRRELEVANT EXCEPT IN CERTAIN CASES.

ART. 14. Hearsay and the contents of documents irrelevant, Page 64

Section I. — *Hearsay when Relevant.*

ART. 15. Admissions defined — 16. Who may make admissions on behalf of others, and when — 17. Admissions by agents and persons jointly interested with parties — 18. Admission by strangers — 19. Admission by person referred to by party — 20. Admissions made without prejudice — 21. Confessions defined — 22. Confession caused by inducement, threat, or promise, when irrelevant in Criminal Proceeding — 23. Confessions made upon oath, &c. — 24. Confession made under a promise of secrecy — 25. Statements by deceased persons when deemed to be relevant — 26. Dying declaration as to cause of death — 27. Declarations made in the course of business or professional duty — 28. Declarations against interest — 29. Declarations by testators as to contents of will — 30. Declarations as to public and general rights — 31. Declarations as to pedigree — 32. Evidence given in former proceeding when relevant 65–90

Section II. — *Statements in Books, Documents, and Records, when relevant.*

ART. 33. Recitals of public facts in statutes and proclamations — 34. Relevancy of entry in public record made in performance of duty — 35. Relevancy of statements in works of history, maps, charts, and plans — 36. Entries in bankers' books — 37. Exceptions to article 36 — 38. Judges' powers as to bankers' books — 39. "Judgment" — 40. All judgments conclusive proof of their legal effect — 41. Judgments conclusive as between parties and privies of Facts forming ground of judgment — 42. Statements in judgments irrelevant as between strangers, except in Admiralty Cases — 43. Effect of judgment not pleaded as an estoppel — 44. Judgments generally deemed to be irrelevant as between strangers — 45. Judgments conclusive in favor of Judge — 46. Fraud, collusion, or want of jurisdiction may be proved — 47. Foreign judgments 90–102

CHAPTER V.

OPINIONS, WHEN RELEVANT AND WHEN NOT.

ART. 48. Opinion generally irrelevant — 49. Opinions of experts on points of science or art — 50. Facts bearing upon opinions of ex-

perts — 51. Opinion as to handwriting, when deemed to be relevant — 52. Comparison of handwritings — 53. Opinion as to existence of marriage, when relevant — 54. Grounds of opinion, when deemed to be relevant . . . . . Page 103–110

CHAPTER VI.

CHARACTER, WHEN DEEMED TO BE RELEVANT AND WHEN NOT.

ART. 55. Character generally irrelevant — 56. Evidence of character in Criminal Cases — 57. Character as affecting damages, 111–113

PART II.

ON PROOF.

CHAPTER VII.

FACTS PROVED OTHERWISE THAN BY EVIDENCE — JUDICIAL NOTICE.

ART. 58. Of what Facts the Court takes judicial notice — 59. As to proof of such Facts — 60. Evidence need not be given of Facts admitted 114–118

CHAPTER VIII.

OF ORAL EVIDENCE.

ART. 61. Proof of Facts by oral evidence — 62. Oral evidence must be direct 119

CHAPTER IX.

OF DOCUMENTARY EVIDENCE — PRIMARY AND SECONDARY, AND ATTESTED DOCUMENTS.

ART. 63. Proof of contents of documents — 64. Primary evidence — 65. Proof of documents by primary evidence — 66. Proof of execution of document required by law to be attested — 67. Cases in which attesting witness need not be called — 68. Proof when attesting witness denies the execution — 69. Proof of document not required by law to be attested — 70. Secondary evidence — 71. Cases in which secondary evidence relating to documents may be given — 72. Rules as to notice to produce 120

CHAPTER X.

PROOF OF PUBLIC DOCUMENTS.

ART. 73. Proof of public documents — 74. Production of document itself — 75. Examined copies — 76. General records of the realm — 77. Exemplifications — 78. Copies equivalent to exemplifications — 79. Certified copies — 80. Documents admissible throughout the Queen's dominions — 81. Queen's printer's copies — 82. Proof of Irish statutes — 83. Proclamations, Orders in Council, &c. — 84. Foreign and colonial acts of state, judgments, &c. . Page 129–137

CHAPTER XI.

PRESUMPTIONS AS TO DOCUMENTS.

ART. 85. Presumption as to date of a document — 86. Presumption as to stamp of a document — 87. Presumption as to sealing and delivery of deeds — 88. Presumption as to documents thirty years old — 89. Presumption as to alterations 138–141

CHAPTER XII.

OF THE EXCLUSION OF ORAL BY DOCUMENTARY EVIDENCE, AND OF THE MODIFICATION AND INTERPRETATION OF DOCUMENTARY BY ORAL EVIDENCE.

ART. 90. Evidence of terms of contracts, grants, and other dispositions of property reduced to a documentary form — 91. What evidence may be given for the interpretation of documents — 92. Cases to which articles 90 and 91 do not apply . . . 142–151

PART III.

PRODUCTION AND EFFECT OF EVIDENCE.

CHAPTER XIII.

BURDEN OF PROOF.

ART. 93. He who affirms must prove — 94. Presumption of innocence — 95. On whom the general burden of proof lies — 96. Burden of proof as to particular Fact — 97. Burden of proving Fact to be proved to make evidence admissible 152–157

CHAPTER XIV.

On Presumptions and Estoppels.

Art. 98. Presumption of legitimacy — 99. Presumption of death from seven years' absence — 100. Presumption of lost grant — 101. Presumption of regularity and of deeds to complete title — 102. Estoppel by conduct — 103. Estoppel of tenant and licensee — 104. Estoppel of acceptor of bill of exchange — 105. Estoppel of bailee, agent, and licensee . . . . . Page 158–165

CHAPTER XV.

Of the Competency of Witnesses.

Art. 106. Who may testify — 107. What witnesses are incompetent — 108. Competency in Criminal Cases — 109. Competency in proceedings relating to adultery — 110. Communications during marriage — 111. Judges and advocates privileged as to certain questions — 112. Evidence as to affairs of State — 113. Information as to commission of offences — 114. Competency of jurors — 115. Professional communications — 116. Confidential communications with legal advisers — 117. Clergymen and medical men — 118. Production of title-deeds of witness not a party — 119. Production of documents which another person, having possession, could refuse to produce — 120. Witness not to be compelled to criminate himself — 121. Corroboration, when required — 122. Number of witnesses 166–178

CHAPTER XVI.

Of taking Oral Evidence, and of the Examination of Witnesses.

Art. 123. Evidence to be upon oath, except in certain cases — 124. Form of oaths; by whom they may be administered — 125. How oral evidence may be taken — 126. Examination in chief, cross-examination, and re-examination — 127. To what matters cross-examination and re-examination must be directed — 128. Leading questions — 129. Questions lawful in cross-examination — 130. Exclusion of evidence to contradict answers to questions testing veracity — 131. Statements inconsistent with present testimony may be proved — 132. Cross-examination as to previous statements in writing — 133. Impeaching credit of witness — 134. Offences against women — 135. What matters may be proved in reference

to declarations relevant under articles 25–34 — 136. Refreshing memory — 137. Right of adverse party as to writing used to refresh memory — 138. Giving, as evidence, document called for and produced on notice — 139. Using, as evidence, a document, production of which was refused on notice . . . . Page 179–193

CHAPTER XVII.

OF DEPOSITIONS.

ART. 140. Depositions before magistrates — 141. Depositions under 30 & 31 Vict. c. 35, s. 6 — 142. Depositions under Merchant Shipping Act, 1854 194–197

CHAPTER XVIII.

OF IMPROPER ADMISSION AND REJECTION OF EVIDENCE.

ART. 143 198

APPENDIX OF NOTES 200

INDEX 247

TABLE OF CASES CITED.

A.

PAGE

Abney *v.* Kingsland . . . 45
Abrams *v.* Pomeroy . . . 138
Adams *v.* Davidson . . . 67
——— *v.* Lloyd 173
——— *v.* Seitzenger . . . 82
——— *v.* Swansea 88
Adie *v.* Clark 147
A. G. *v.* Bryant 169
——— *v.* Hitchcock . . 39, 186
Aldous *v.* Cornwell . . 80, 140
Alivon *v.* Furnival. . . . 126
Allen *v.* Dundas 95
——— *v.* Prink 145
Allgood *v.* Blake 227
Alner *v.* George. 211
Am. Fur. Co. *v.* United States 46
Amos *v.* Hughes 153
Anderson *v.* Parker . . . 88
——— *v.* Weston . . . 138
Angel *v.* Duke 145
Annapolis R. R. Co. *v.* Gantt 56
Annesley *v.* Anglesea . . . 172
Appleton *v.* Braybrooke . . 223
Armoury *v.* Delamire. . . 155
Aveson *v.* Lord Kinnaird 44, 61

B.

B. & S. R. R. *v.* Woodruff . 56
Bacon *v.* Chesney 70
Bailey *v.* Bidwell 123
——— *v.* Haines 198
——— *v.* Taylor 141
Baird *v.* Daly 88
——— *v.* Gillett 89
Balentine *v.* White. . . . 175
Bank of Hindustan, Allison's Case 97
Bank of Utica *v.* Mersereau 171
Barber *v.* Merriam. . . . 61

PAGE

Baron de Bode's Case . . 104
Barrett *v.* Long 60
Barrs *v.* Jackson 96
Barry *v.* Ryan 122
Barton *v.* Dawes 144
Bateman *v.* Bailey 52
Bauerman *v.* Radenius . . 211
Bayliss *v.* A. G.. 148
Beardsley *v.* Wildman . . 186
Beatson *v.* Skene 169
Beatty *v.* Clement 82
Beaufort *v.* Crawshay . . 105
Bedford (Duke of) *v.* Lopes 48
Beedy *v.* Macomber . . . 81
Beeston's Case 90
Bell *v.* Morrison. 70
Benham *v.* Dunbar. . . . 42
Berkeley Peerage Case . 88, 217
Bersh *v.* State 58
Biddle *v.* Bond 165
Birt *v.* Barlow 109
Blackett *v.* Royal Exchange 148
Blair *v.* Pelham 105
Blatner *v.* Weis 81
Bliss *v.* Brainard 156
Bob *v.* State 52
Boddy *v.* Boddy. 42
Bogart *v.* Brown 193
Bolton *v.* Liverpool . . . 172
Bonelli, Goods of 105
Boon *v.* State 198
Boston & Wor. R. R. Co. *v.* Dana. 44
Bottomley *v.* United States . 58
Boyce *v.* Cheshire R. R. Co. 56
Boyden *v.* Burke 44
Boyse *v.* Rossborough . . 54
Bradley *v.* James 82
Brain *v.* Preece 80
Brander *v.* Ferridy. . . . 60
Brandt *v.* Klein 128
Brassington *v.* Brassington . 173

	PAGE
Breton *v.* Cope	122
Bright *v.* Pennywit	128
Bristow *v.* Segueville	104
Brittain *v.* Kinnaird	101
Broad *v.* Pitt	236
Brobston *v.* Cahill	109
Brogg's Case	89
Brooks *v.* Acton	40
Brough *v.* Lord Scarsdale	48
Brown *v.* Bulkley	154
——— *v.* Com.	79
——— *v.* Foster	171
——— *v.* Woodman	120
Broyles *v.* State	51
Brubaker *v.* Taylor	184
Bruce *v.* Nicolopulo	146
Bull *v.* Loveland	125, 174
Bullard *v.* Pearsall	188
Bunnell *v.* Butler	183
Burgess *v.* Langley	170
Burke *v.* Miller	47
Burlen *v.* Shannon	95
Burnham *v.* Morrissey	173
Burr's Trial	175
Burton *v.* Driggs	126
Bush *v.* Guion	62
Butler *v.* Collins	58
——— *v.* Millet	66
——— *v.* Moore	235

C.

Caddy *v.* Barlow	95
Caermarthen Railway Co. *v.* Manchester Railway Co.	70
Call *v.* Dunning	122
Calvert *v.* Flower	193
Calypso, The	100
Campbell, Admr., *v.* Chicago, Rock Island, & Pac. R. R. Co.	39
Campbell *v.* People	39
Carleton *v.* Patterson	44
Carlisle *v.* Hunley	187
Carr *v.* L. & N. W. Railway	231
—— *v.* McPike	45
Carter *v.* Boehm	104
——— *v.* Buchanan	44, 205
Cartwright *v.* Green	175
Castrique *v.* Imrie	102, 219
Catherwood *v.* Caslon	109
Catlin *v.* Springfield F. Ins. Co.	154
Chaffee *v.* United States	86, 81
Chamberlin *v.* Wilson	175
Chambers *v.* Bernasconi	80
Chandler *v.* Grieves	117
Chandler *v.* Jamaica Pond Aqueduct Corp.	42
Chandler *v.* Roeder	42
Chapel *v.* Washburn	70
Chapman *v.* Chapman	87
Charleston R. R. Co. *v.* Blake	69
Charlton *v.* Coombes	171
Charter *v.* Charter	226
Chasemore *v.* Richards	161
Christy *v.* Kavanagh	157
Chubb *v.* Salomons	169
Ciocci *v.* Ciocci	38
Clapp *v.* Foster	72
——— *v.* Ingersoll	82
Clay *v.* Langslow	212
Clayton *v.* Lord Nugent	148
Cleave *v.* Jones	76
Cleaveland *v.* Grand Trunk R. R. Co.	56
Clementi *v.* Golding	117
Clifford *v.* Burton	69
Clinton *v.* Estes	47
Closmadeuc *v.* Carrel	139
Coale *v.* H. & St. J. R. R. Co.	56
Coffin *v.* Bucknam	82
Cole *v.* Sherard	116
Coleman *v.* Com.	105
——— *v.* Fobes	70
——— *v.* People	58
Colling *v.* Trewick	120
Collins *v.* Bayntun	122
——— *v.* Dorchester	56
Com. *v.* Billings	41
——— *v.* Bonner	186
——— *v.* Coe	59
——— *v.* Cuffee	73
——— *v.* Dana	76
——— *v.* Davis	43
——— *v.* Drake	74
——— *v.* Harwood	54
——— *v.* Howe	76, 176, 183
——— *v.* Jennings	53
——— *v.* King	76
——— *v.* Knapp	75
——— *v.* Lyden	183
——— *v.* Mason	51
——— *v.* McCarthy	59
——— *v.* Mead	170
——— *v.* Morgan	175

	PAGE
Com. *v.* Morrell	183
—— *v.* Pomeroy	156
—— *v.* Reid	176
—— *v.* Shaw	176, 185
—— *v.* Sparks	176
—— *v.* Stearns	58
—— *v.* Stone	59
—— *v.* Sturtivant	103
—— *v.* Tolliver	50
—— *v.* Walker	52
—— *v.* Webster	50
—— *v.* Welch	188
—— *v.* Williams	105
—— *v.* Wilson	192
Conrad *v.* Griffey	187
Conyers *v.* State	156
Cook *v.* Brown	187
Coole *v.* Braham	71
Cooper *v.* Tamswell	123
Cope *v.* Cope	159
Copperman *v.* People	58
Cory *v.* Bretton	72
Coulson *v.* Walton	141
Coulter *v.* Am. Exp. Co.	188
Craig *v.* State	190
Crease *v.* Barret	85
Cronk *v.* Frith	22
Crossley *v.* Dixon	165
Crouse *v.* Miller	65
Curry *v.* Walter	168

D.

Da Costa *v.* Jones	203
Dana *v.* Boyd	128
Danforth *v.* Carter	70
Daniel *v.* Pitt	71
Darling *v.* Westmoreland	39, 56
Dartmouth (Lady) *v.* Roberts	223
Davenport *v.* Ledger	186
Davidson *v.* Cooper	80, 140
Davies *v.* Lowndes	81
—— *v.* Waters	174
Davis *v.* State	89
Dazey *v.* Mills	66
De Thoren *v.* A. G.	109
Devote *v.* Com.	58
Dezell *v.* Odell	165
Dillingham *v.* Snow	86
Di Sora *v.* Phillipps	104
Dixon *v.* Hammond	165
Doe *v.* Barton	164
—— *v.* Baytup	164
—— *v.* Beaviss	83
—— *v.* Brydges	98
—— *v.* Catomore	141
—— *v.* Coulthred	154
—— *v.* Date	173
—— *v.* Derby	89
—— *d.* Devine *v.* Wilson	160
—— *v.* Edwards	116
—— *d.* Hammond *v.* Cooke	161
—— *v.* Hiscocks	149, 226
—— *v.* Hodgson	193
—— *v.* Keeling	105
—— *v.* Kemp	45
—— *v.* Lloyd	117
—— *v.* Needs	150, 226
—— *v.* Palmer	141
—— *v.* Pegg	164
—— *v.* Pulman	48
—— *v.* Ries	128
—— *v.* Ross	129
—— *v.* Sackermore	106
—— *v.* Smyth	164
—— *v.* Tatham	89, 219
—— *v.* Turford	79
—— *v.* Voules	84
—— *v.* Wilson	160
Doncaster (Mayor of) *v.* Day	89
Dover *v.* Child	96
Dowling *v.* Dowling	37
Draper *v.* Snow	142
Drennen *v.* Lindsey	187
Du Barre *v.* Livette	235
Duchess of Kingston's Case	173
Dunn's Case	58
Durell *v.* Evans	121
Durgin *v.* Danville	157, 188
Dwight *v.* Brown	33
Dwyer *v.* Collins	127, 222

E.

Earl's Trust	116
Eason *v.* Chapman	190
Eddy *v.* Gray	38
Edington *v.* Mut. L. Ins. Co.	61
Egan *v.* Bowker	51
Eiker *v.* McAllister	63
Elkin *v.* Janson	156
Ennis *v.* Smith	94
Entick *v.* Carrington	125

PAGE

Eskridge *v.* State 76
Evans *v.* Beattie 70
——— *v.* Rees 215

F.

Fail *v.* McArthur 44
Fairlie *v.* Hastings 212
Faucet *v.* Nichols 62
Fauts *v.* State 73
Fenn's Case 89
Fenwick *v.* Thornton . . . 67
Feversham *v.* Emerson . . 99
Few *v.* Guppy 174
Field *v.* N. Y. Central R. R. Co. 56
Fitzpatrick *v.* Fitzpatrick . 149
Flannigan *v.* People . . . 156
Flitters *v.* Allfrey 96
Follett *v.* Jefferyes . . . 171
Foote *v.* Hayne 171
Forbush *v.* Goodwin . . . 40
Foulkes *v.* Chadd 107
Fraternal Mut. Life Ins. Co. *v.* Applegate 61
Frazier *v.* Hunter 86
Frear *v.* Evertson 67
Freeman *v.* Cooke . . 162, 231
Fry *v.* Wood 89
Fuller *v.* Fuller 180

G.

Galena R. R. Co. *v.* Fay . 44, 187
Garber *v.* State 44
Garland *v.* Jacomb . . . 164
Geralopulo *v.* Wieler . . . 121
Gerish *v.* Chartier 60
Gery *v.* Redman 50
Geyer *v.* Aguilar . . . 29, 145
Gibbs *v.* Tinsley 187
Gibson *v.* Am. Mut. Life Ins. Co. 39
——— *v.* Hunter 60
Gillies *v.* Smither 122
Gleadow *v.* Atkin . . . 81, 215
Glynn *v.* George 164
Godard *v.* Gray . . . 102, 219
Goodall *v.* State 191

PAGE

Goodtitle *v.* Baldwin . . . 160
Gorrissen *v.* Perrin . . . 148
Gosling *v.* Birnie 165
Goss *v.* Lord Nugent . . 165, 225
Grand Tr. R. R. Co. *v.* Richardson 56
Gray's Case 78
Great Falls Co. *v.* Worster . 86
Great Western R. R. *v.* Bacon 156
Green *v.* New River Co. . . 95
Greenough *v.* Eccles . . . 188
——— *v.* Gaskell . . . 234
Griffin *v.* Mont. R. R. Co. . 69
Guild's Case 75
Guy *v.* West 154

H.

Haigh *v.* Belcher 43
Halifax Guardians *v.* Wheelwright 231
Hall *v.* Bainbridge 134
—— *v.* Hill 150
Hamilton *v.* People . . 103, 190
Hammond *v.* Bradstreet . . 86
Hardman *v.* Wilcock . . . 165
Hardy *v.* Merrill 103
Hargrave *v.* Hargrave . . 158
Harratt *v.* Wise 61
Harriman *v.* Brown . . . 81
——— *v.* Stowe . . . 45
Harrington *v.* Lincoln . . 72
Harris *v.* Holmes 43
Hart *v.* Powell 45, 65
Harwood *v.* Mulry 80
Hawes *v.* Marchant . . . 162
Hawkes *v.* Charlemont . . 56
Head *v.* Taylor 37
Heath *v.* Com. 57
Hedge *v.* Clapp 187
Helyear *v.* Hawke 69
Hendrickson *v.* People . . 76
Henry *v.* Bishop 123
Hetherington *v.* Kemp . . 63
Higham *v.* Ridgway . . 82, 214
Hiscocks *v.* Hiscocks . . . 227
Hoener *v.* Koch 106
Holcombe *v.* Hewson . . . 55
Holler *v.* State 39
Holt *v.* Crume 43
—— *v.* Squire 70

	PAGE
Hope *v.* Liddell	173
Hopewell *v.* De Pinna	159
Hopkins *v.* Lee	102
Horbuck *v.* State	39
Hough *v.* Doyle	69
Houlston *v.* Smith	138
How *v.* Hall	128
Howard *v.* Hudson	163
——— *v.* Sexton	60
Howe *v.* Cole	162
Hume *v.* Scott	190
Hunter *v.* Atkins	154
——— *v.* Leathley	173
Hurst *v.* Leach	150
Huston *v.* Schindler	109
Hutchins *v.* Kennel	109
Hutchinson *v.* Bernard	182

I.

Ill. Cen. R. R. Co. *v.* Sutton	61
Insurance Co. *v.* Moody	45
Ireland (Bank of) *v.* Evans	231
Iron Mt. Bank *v.* Murdock	39

J.

Jackson *v.* Boneham	88
——— *v.* Browner	87
——— *v.* Smith	39
Jaggers *v.* Binning	70
Janvrin *v.* Scammon	175
Jarboe *v.* Kepler	187
Jarrett *v.* Leonard	71
Jewell *v.* Jewell	87
Johnson *v.* Kershaw	126
——— *v.* Sherwin	45
Jones *v.* Phelps	123
——— *v.* State	41
——— *v.* Stevens	112
——— *v.* Williams	45
Jordan's Case	45

K.

Kearney *v.* Farrell	44
Keenan *v.* State	39
Kelley *v.* Jackson	36
——— *v.* People	52
Kelsey *v.* Universal Life Ins. Co.	61
Kemp *v.* King	174
Kempland *v.* Macaulay	71
Kendricks *v.* State	89
Kennedy *v.* Doyle	80
Kensington *v.* Inglis	192
Ketchingman *v.* State	187
Kimball *v.* Huntington	67
Kingston (Duchess of) Case	98, 173
Kinney *v.* Farnsworth	86
Kinsman *v.* Parkhurst	165
Kirkstall Brewery Co. *v.* Furness Railway Co.	69
Knight *v.* Clements	141
Knights *v.* Wiffen	163
Koster *v.* Reed	155
Kurtz *v.* Hibner	149

L.

Lady Ivy's Case	54
Landell *v.* Hotchkiss	56
Langhorn *v.* Allnutt	69
Lawton *v.* Sweeney	155
Leconfield *v.* Lonsdale	160
Lee *v.* Kilburn	60
—— *v.* Pain	149
Leeds *v.* Cook	128
Leggatt *v.* Tollervey	76, 95
Legge *v.* Edmonds	159
Lewis *v.* Kramer	80
Ley *v.* Barlow	174
Lindley *v.* Lacey	145
Little's Case	45
Lloyd *v.* Mastyn	76
Londonderry *v.* Andover	88
Longabaugh *v.* Virginia, &c. R. R. Co.	56
Losee *v.* Losee	65, 191
Lothian *v.* Henderson	97
Lothrop *v.* Greenfield	63
Lucas *v.* De la Cour	69
Luttrell *v.* Regnal	188
Lynch *v.* Com.	156

M.

—— *v.* Moor	112
McAllister's Case	43
McCreary *v.* Hood	128

	PAGE
McDaniel *v.* State	78
McDonald *v.* Savoy	56
Macdougall *v.* Purrier	161
McKenna *v.* Bliss	117
McMahon *v.* McElroy	159
McNeil *v.* Hill	163
Maguire *v.* Middlesex R. R. Co.	56
Maitland *v.* Cit. Nat. Bank	188
Malcolmson *v.* O'Dea	204
Malpas *v.* Clements	63
Mann *v.* Langton	202
Many *v.* Jagger	67
Marine Investment Co. *v.* Haviside	139
Marston *v.* Downes	125
Matthews, *In re*	115
Mehan *v.* State	156
Metcalf *v.* Van Benthuysen	85
Meldrum *v.* Clark	138
Melhuish *v.* Collier	188
Merkle *v.* State	192
Meyer *v.* Sefton	126
Miles *v.* Oddy	125
Miller *v.* Stevens	146
—— *v.* Travers	149
Mills *v.* Barber	154
Minet *v.* Morgan	172
Montgomery *v.* Pickering	173
Mitchell *v.* Sellman	40
Mobile R. R. *v.* Ashcroft	56
Monroe *v.* Napier	67
Moore *v.* Conn. &c. R. R. Co.	69
Moppin *v.* Ætna Axle, &c. Co.	43
Morgan *v.* Griffiths	145
Moriarty *v.* L. C. & D. Railway Co.	50, 66, 211
Morris *v.* Davies	159
—— *v.* Eastham	56
—— *v.* Miller	109
Morrissey *v.* Ingham	41
Mortimer *v.* McCallan	128
Muggleton *v.* Barnett	49
Munn *v.* Godbold	124, 126
Mut. Ben. Life Ins. Co. *v.* Tisdale	95

N.

Needham *v.* Bremner	95
Neil *v.* Jakle	51
Nelson *v.* State	44
Nepean *v.* Doe	159
—— *v.* Knight	159
Newcastle (Duke of) *v.* Broxtowe	86
Newcomb *v.* Griswold	186
New Haven *v.* Mitchell	138
New Milford *v.* Sherman	45
Newton *v.* Chaplin	127
—— *v.* Mut. Ben. Life Ins. Co.	44
Noble *v.* Ward	225
Noden *v.* Murray	121
Noonan *v.* State	52
Nutting *v.* Page	44

O.

Ochsenbein *v.* Papelier	102
O'Connor *v.* Halinan	105
Omichund *v.* Barker	180
Osgood *v.* Nichols	165
Otterson *v.* Hofford	65

P.

Packet Co. *v.* Clough	69
Paddock *v.* Forester	72
Page *v.* Faucet	117
Palmer *v.* Trower	186
Papendick *v.* Bridgewater	84
Patchin *v.* Astor Ins. Co.	187
Patton *v.* Freeman	192
Pearce *v.* Hooper	128
Pearse *v.* Jenkins	81
—— *v.* Pearse	172
Penn. R. R. Co. *v.* Stranahan	56
People *v.* Corbin	58
—— *v.* Doyell	187
—— *v.* Garbutt	156
—— *v.* Grunzig	78
—— *v.* Horton	176
—— *v.* Jacobs	188
—— *v.* Manning	186
—— *v.* Mariano Soto	157
—— *v.* Marion	58
—— *v.* Mather	175
—— *v.* McCoy	75
—— *v.* McMahon	76
—— *v.* Real	103
—— *v.* Robinson	76

	PAGE
People *v.* Safford	188
——— *v.* Scroggins	39
——— *v.* Sheriff	171
——— *v.* Stanley	47
——— *v.* Vernon	44
——— *v.* Williams	198
Petch *v.* Lyon	70
Petrie *v.* Nuttall	101
Phelps *v.* Prew	174
Phené's Trust, *re*	159
Philips *v.* Bury	95
Phillips *v.* Allen	159
Pickard *v.* Sears	162, 231
Pickering *v.* Noyes	173
Picton's Case	104
Pierce *v.* Hoffman	58
Piers *v.* Piers	109
Pigott's Case	140
Pim *v.* Curell	86
Pipe *v.* Fulcher	86
Piper *v.* Chappell	115
——— *v.* Pearson	101
Plaxton *v.* Dare	86
Plumer *v.* Brisco	123
Plunkett *v.* Cobbett	169
Pocock *v.* Billings	67
Poole *v.* Perritt	175
——— *v.* Warren	123
Pope *v.* State	89
Potter *v.* Sewall	143
Powell, *Ex parte. In re* Matthews	49, 115
Pratt *v.* Patterson	183
Preston's Case	60
Price *v.* Torrington	80, 214
Prindle *v.* Glover	88, 54
Pritt *v.* Fairclough	80
Pym *v.* Campbell	145

Q.

Queen's Case, The	187
Quick *v.* Quick	85
Quinsigamond Bk. *v.* Hobbs	190

R.

Rea *v.* Missouri	184
R. *v.* ———	202
— *v.* Adamson	151
— *v.* All Saints, Worcester	175
R. *v.* Baker	79, 214
— *v.* Baldry	213
— *v.* Barnard	53
— *v.* Bathwick	175
— *v.* Bembridge	11
— *v.* Bispham	190
— *v.* Blake	47
— *v.* Bliss	86
— *v.* Boswell	74
— *v.* Boyes	175
— *v.* Burke	89
— *v.* Butler	154
— *v.* Canning	63
— *v.* Castleton	126
— *v.* Cheadle	151, 229
— *v.* Chidley & Cummins	76
— *v.* Clapham	80
— *v.* Clarke	190
— *v.* Clewes	49, 75
— *v.* Cliviger	175
— *v.* Cokin	42
— *v.* Cole	55
— *v.* Cooper	59
— *v.* Cotton	62
— *v.* Cresswell	161
— *v.* Crittenden	41
— *v.* Davis	57
— *v.* Derrington	76
— *v.* Donellan	54
— *v.* Doolin	183
— *v.* Dove	106
— *v.* Drummond	191
— *v.* Dunn	57
— *v.* Edmunds	51
— *v.* Ellis	57
— *v.* Eriswell	89
— *v.* Exeter	84
— *v.* Forster	58
— *v.* Foster	44
— *v.* Foulkes	44
— *v.* Francis	59
— *v.* Francklin	91
— *v.* Garbett	75
— *v.* Garner	62
— *v.* Gazard	168
— *v.* Geering	62
— *v.* Gilham	74
— *v.* Gordon	141
— *v.* Gould	75
— *v.* Gray	62, 207
— *v.* Griffin	236
— *v.* Halliday	175
— *v.* Harborne	159

PAGE

R. v. Hardy 47, 169
— v. Harringworth . . 122, 221
— v. Hartington Middle Quarter 96
— v. Haworth 125
— v. Heyford 84
— v. Hind 78
— v. Hogg 89
— v. Holmes 191
— v. Holt 59
— v. Horne Tooke 108
— v. Hull 145
— v. Hutchinson 78
— v. Jarvis 156
— v. Jeffries 117
— v. Jenkins 78
— v. Llanfaethly 128
— v. Lloyd 74
— v. Long 57
— v. Lord George Gordon . 54
— v. Lord Thanet 234
— v. Luffe 159
— v. Lumley 159
— v. Mainwaring 109
— v. Mansfield 159
— v. Martin 191
— v. Mead 78
— v. Moore 74
— v. Mosley 78
— v. Oddy 57
— v. Orton 185
— v. Palmer 80, 64, 105
— v. Parbhudas and Others 202
— v. Patch 50
— v. Payne 167
— v. Pike 191
— v. Reason 73
— v. Reeve 73
— v. Richardson 62, 169
— v. Roden 62
— v. Rowton 80, 219
— v. Russell 233
— v. Scaife 89, 194
— v. Scott 76
— v. Sparkes 235
— v. Stephenson 194
— v. Stone 156
— v. Sutton 91
— v. Tait 195
— v. Thompson 167
— v. Thornhill 118
— v. Turner 100
— v. Twyning 153

PAGE

R. v. Walker 52
— v. Warwickshall . . . 75
— v. Watson . . . 121, 183
— v. Whitehead 183
— v. Widdop 76
— v. Woodcock 79
— v. Wylie 57
Radcliffe v. Fursman . . . 172
Railroad Co. v. Smith . . 198
Randall v. Lynch 123
Rawson v. Haigh . . . 45, 52
Rearden v. Minter 128
Reed v. People 186
Reels v. Knights 37
Reeve v. Wood 167
Redd v. Muscogee R. R. Co. 162
Reffell v. Reffell 142
Reformed Dutch Church v. Ten Eyck 64
Relyea v. New Haven . . 165
Rhoades v. Selin 128
Richmond v. Thomaston . 45
——— v. Vassalborough 45
Roath v. Driscoll 161
Rob v. Hackley 187
Roberts v. Doxen 126
——— v. Johnson . . . 183
Robinson v. Hutchinson . 67, 187
——— v. Yarrow . . . 164
Rockwell v. Taylor . . . 69
Roe d. West v. Davis . . . 121
—— v. Neal 88
Rogers v. Allen 48
Rose v. Bryant 82
Roseboom v. Billington . . 82
Rosenbaum v. State . . . 111
Rowland v. Doe 39
Rowley v. L. & N. W. Railway 104
Ryall v. Hannam 149

S.

Sanderson v. Coleman . . 164
Sandilands, re 139
Sargent v. Sargent . . . 67
Sasser v. Herring 86
Schoeffler v. State 76
Scott v. Miller 175
—— v. Ratcliff. 88
Sears v. Wingate 165
Shaser v. State 59

PAGE

Shaw v. Emery 190
Shearer v. Harber 89
Shedden v. Att'y-Gen. . . 88
——— v. Patrick . . . 39
Sheen v. Bumpstead . . . 60
Sheffill v. Van Deusen . . 39
Shepard v. Geddings . . . 128
Sheridan v. New Quay . . 165
Shields v. Boucher . . . 217
Shoemaker v. Benedict . . 70
Shore v. Wilson 148
Short v. Lee 214
Shrewsbury v. Hayward . 42
Shrewsbury Peerage Case . 87
Shriedly v. State 58
Sievewright v. Archibald . 121
Simmons v. Rudall . . . 141
Simpson v. Dendy 46
Sinclair v. Baggallay . . . 138
——— v. Murphy . . . 165
Skilbeck v. Garbett . . . 68
Slane Peerage Case . . . 130
Slatterie v. Pooley . . . 30, 120
Slattery v. People . . . 38, 51
Sloan v. People 41
Smith v. Blakey 80
——— v. Montgomery . . 38
——— v. Morgan 67
——— v. Prewitt 86
——— v. People 187
——— v. Ward 143
——— v. Whippingham . . 70
——— v. Wilson 148
Solomon v. Dreschler . . . 156
Spargo v. Brown 212
Spears v. Ward 146
Speer v. Coate 86
Spring v. Eve 117
State v. Alford 38, 198
——— v. Arnold 154
——— v. Berg 140
——— v. Boswell 190
——— v. Brewster 42
——— v. Briggs 176
——— v. Broughton . . . 76
——— v. Crawford 156
——— v. Dudley 176
——— v. Ela 175
——— v. Fitzhugh 79
——— v. Ford 198
——— v. Foster 156
——— v. Gardner 176
——— v. Garrett 75

PAGE

State v. Graham 76
——— v. Hays 198
——— v. Hirsch 156
——— v. Hodges 42
——— v. Howard 45
——— v. Jones 76
——— v. Knapp 50
——— v. Littlefield 177
——— v. Pike 103, 156
——— v. Reed 50
——— v. Ross 47
——— v. Sagen 187
——— v. Shackford 62
——— v. Shelledy 44
——— v. Stallings 190
——— v. Terrell 79
——— v. Tilghman 105
——— v. Vaigneur 75
——— v. Wagner 79
——— v. Watkins 37
——— v. Welch 176
——— v. Wentworth . . 57, 74
——— v. Williams 50
——— v. Wilson 79
Stead v. Heaton 83
Stearns v. Hall 143
Stein v. Bowman 87
Steinhouse v. State . . . 38
Stephens v. Baird 162
Stoate v. Stoate 97
Stobart v. Dryden 64
Stockfleth v. De Tastet . . 72
Stokes v. People 39
Stolp v. Blair 38, 187
Stone v. People 111
Stover v. People 175
Stowe v. Querner 127
Stringer v. Gardiner . . . 150
Sugden v. St. Leonards . . 84
Summers v. State 89
Sumner v. Cook 67
Sussex Peerage Case . . 84, 192
Swan v. British and Australasian Co. 163, 231
Swift v. Mass. Mut. L. Ins. Co. 44

T.

Talbot v. Hodson 124
Taylor v. Barclay 117
——— v. Foster 171

PAGE

Taylor *v.* Gould 81
Thayer *v.* Thayer 42
Thomas *v.* Newton 176
Thompson *v.* Drake . . . 66
——— *v.* Stevens . . . 83
Thorington *v.* Smith . . . 146
Thorndike *v.* Boston . . 45, 198
Thurtell *v.* Beaumont . . . 153
Tilton *v.* Beecher . . . 168, 176
Tracy *v.* McMannus . . . 38
Trelawney *v.* Coleman . . 61
Tucker *v.* Welch 187
Turner *v.* Baldwin 48
Turquand *v.* Knight . . . 171
Tyler *v.* Ulmer 95

U.

Unis *v.* Charlton 187
United States *v.* Chapman . 75
——— *v.* Flowery . 43
——— *v.* Gooding . . 156
——— *v.* McComb . 89
——— *v.* Moses . . 169
——— *v.* Teschmaker 117

V.

Vaise *v.* Delaval 170
Van Buren *v.* Wells . . . 43
Van Kuren *v.* Parmelee . . 70
Veiths *v.* Hagge 153
Volant *v.* Soyer 174
Vooght *v.* Winch 99
Vose *v.* Morton 102

W.

Wagner's Case 117
Wallis *v.* Littell 145
Ware *v.* Ware 187
Warner *v.* Lucas 175
Warren *v.* Warren 63
Webb *v.* Bird 161

PAGE

Wedley *v.* Baugh 161
Weeks *v.* Sparke . . . 85, 216
Weidler *v.* Farmers' Bank . 43
Welch *v.* Mandeville . . . 67
Welsh *v.* State 156
Westfall *v.* Erie R. R. Co. . 38
Weston *v.* Eames 144
Wetherell *v.* Mar. Ins. Co. . 162
Wharam *v.* Routledge . . 193
Wheat *v.* State 156
Wheelden *v.* Wilson . . . 33
Whitaker *v.* Izod 173
——— *v.* Jackson . . . 99
Whitcomb *v.* Whitting . . 70
White *v.* Graves 42
——— *v.* State 75
Whittuck *v.* Walters . . . 88
Whyman *v.* Garth 122, 222
Wiggins *v.* United States . 39
Wigglesworth *v.* Dallison 143, 225
Wilbur *v.* Flood 186
Williams *v.* Bridges . . . 71
——— *v.* East India Co. . 153
——— *v.* Graves 83
——— *v.* State . . . 46, 89
——— *v.* Wood 138
Willoughby *v.* Willoughby . 117
Wilson *v.* Anderton . . . 165
——— *v.* Brownlee . . . 88
——— *v.* Rastall 171
Winchell *v.* Edwards . . . 50
Wing *v.* Angrave 160
——— *v.* Chesterfield . . . 198
Woodcock *v.* Houldsworth . 63
Woodman *v.* Buchanan . . 37
Worthington *v.* Scribner . 169
Wright *v.* Doe *d.* Tatham 52, 108, 198
——— *v.* Hicks 187
——— *v.* State 78

Y.

Young *v.* Clare Hall . . . 214
——— *v.* Foster 109
——— *v.* Grote 163, 231

TABLE OF STATUTES CITED.

	PAGE
7 James I. c. 12	98, 240
20 Ch. II. c. 3	160
7 & 8 Will. III. c. 3, ss. 2, 4	177, 241
2 Geo. III. c. 28	101
13 Geo. III. c. 63	181
———, ss. 40, 42, 44	180
39 & 40 Geo. III. c. 93 .	178, 241
41 Geo. III. c. 90, s. 9 . . .	134
46 Geo. III. c. 37 . . .	176, 241
7 Geo. IV. c. 64, s. 4 . . .	196
7 & 8 Geo. IV. c. 28, s. 11	111, 240
9 Geo. IV. c. 14, s. 1 . . .	68
———, s. 3 . . .	82
1 Will. IV. c. 22	181
3 & 4 Will. IV. c. 42 . . .	240
5 & 6 Will. IV. c. 50, s. 100 .	233
6 & 7 Will. IV. c. 111 . . .	240
1 & 2 Vict. c. 94, s. 1, 12, 13 .	130
———, s. 13 . . .	132
1 & 2 Vict. c. 105	180
3 & 4 Vict. c. 26	233
3 & 4 Vict. c. 105	181
6 & 7 Vict. c. 85	241
8 & 9 Vict. c. 10, s. 6 .	177, 241
8 & 9 Vict. c. 113	241
(preamble)	131, 241
———, s. 1 .	132, 241
———, s. 2 .	115, 241
———, s. 3 . . .	133
———, ss. 4, 5, 6, 7	241
11 & 12 Vict. c. 42 . .	213, 240
———, s. 17 . .	195
———, ss. 40, 42, 45 . . .	180
13 & 14 Vict. c. 21, ss. 7, 8 .	114
14 & 15 Vict. c. 99, ss. 1–20 .	132, 242
———, s. 2 . .	233
———, s. 3 . .	233
———, s. 7 . .	136
14 & 15 Vict. c. 99, ss. 9, 10, 11, 19 .	133
———, s. 14 . .	132
———, s. 16 . .	180
16 & 17 Vict. c. 83, ss. 1, 2 .	233
———, s. 3 . .	168
17 & 18 Vict. c. 104, s. 270 .	196
17 & 18 Vict. c. 125, ss. 22, 27	243
———, s. 2 . .	190
———, s. 20 . .	179
———, ss. 22, 23	238
———, ss. 22–27	243
———, s. 24 . .	189
———, s. 26	124, 222
———, s. 27 . .	108
18 & 19 Vict. c. 111, s. 3 . .	165
19 & 20 Vict. c. 97, s. 13 . .	68
———, s. 14 . .	68
24 & 25 Vict. c. 66	179
———, ss. 1, 2, 3	243
24 & 25 Vict. c. 96, s. 116	112, 240
24 & 25 Vict. c. 99, s. 37	112, 240
28 Vict. c. 18	240, 244
———, ss. 1, 7 .	124, 222
———, ss. 1–8 . . .	244
———, s. 3	190
———, s. 5	189
———, ss. 3–8 . . .	244
———, s. 5 . .	189, 244
———, s. 6 . .	189, 244
———, s. 8	108
———, s. 18	107
28 & 29 Vict. c. 63, s. 6 . .	137
28 & 29 Vict. c. 104, s. 34 . .	167
30 & 31 Vict. c. 35, s. 6	195, 240
31 & 32 Vict. c. 37	134
———, ss. 1, 6 . .	244
———, s. 2 . . .	134
32 & 33 Vict. c. 68, ss. 1–6 .	245
———, s. 2 . . .	176
———, s. 3 .	168, 283

	PAGE
32 & 33 Vict. c. 68, s. 4	179, 232
33 & 34 Vict. c. 49, s. 1	179, 245
——————, ss. 2, 3	245
33 & 34 Vict. c. 79, s. 21	134
34 & 35 Vict. c. 70, s. 5	134
34 & 35 Vict. c. 112, s. 19	57, 240
35 & 36 Vict. c. 6, s. 4	177, 241
36 & 37 Vict. c. 66, s. 25	114
——————, s. 76	115
37 & 38 Vict. c. 35	233
37 & 38 Vict. c. 96	233
38 & 39 Vict. c. 77	180, 198
39 & 40 Vict. c. 48	127
——————, ss. 2, 3	92
——————, ss. 3, 5 (part)	93
——————, ss. 3, 4	127
——————, s. 6	93
——————, s. 7	93
——————, s. 8	174

LIST OF ABBREVIATIONS.

A. & E.	Adolphus & Ellis's Reports.
Atk.	Atkinson's Reports.
B. & A.	Barnewall & Alderson's Reports.
B. & Ad.	Barnewall & Adolphus's Reports.
B. & B.	Broderip & Bingham's Reports.
B. & C.	Barnewall & Cresswell's Reports.
Beav.	Beavan's Reports.
Bell, C. C.	Bell's Crown Cases.
Best	Best on Evidence, 6th ed.
B. & S.	Best & Smith's Reports.
Bing.	Bingham's Reports.
Bing. N. C.	Bingham's New Cases.
B. N. P.	Buller's Nisi Prius.
Br. P. C.	Brown's Parliamentary Cases.
Buller, N. P.	Buller's Nisi Prius.
Cam.	Campbell's Reports.
Car. & Kir.	Carrington & Kirwan's Reports.
C. B.	Common Bench Reports.
C. B. N. S.	Common Bench Reports. New Series.
C. C. C.	Cox's Crown Cases.
Cox, Cr. Ca.	
C. & F.	Clark & Finnelly's Reports.
C. M. & R.	Crompton, Meeson, & Roscoe's Reports.
C. & Marsh.	Carrington & Marshman's Reports.
Cowp.	Cowper's Reports.
C. & P.	Carrington & Paine's Reports.
C. & J.	Crompton & Jervis's Reports.
D. & B.	Dearsley & Bell's Crown Cases.
Dear., or	Dearsley's Crown Cases.
Dearsley & P.	
De Ge. & J.	De Gex & Jones's Reports.
De G. M. & G.	De Gex, Macnaughten, & Gordon.

De G. & S.	De G. & Smale's Reports.
Den. C. C.	Denison's Crown Cases.
Doug.	Douglas's Reports.
Dru. & War.	Drury & Warren's Reports.
Ea.	East's Reports.
East, P. C.	East's Pleas of the Crown.
E. & B.	Ellis & Blackburn's Reports.
Esp.	Espinasse's Reports.
Ex.	Exchequer Reports.
F. & F.	Foster & Finlason's Reports.
Gen. View Cr. Law	Stephen's General View of the Criminal Law.
Hale, P. C.	Hale's Pleas of the Crown.
Hare	Hare's Reports.
H. Bl.	H. Blackstone's Reports.
H. & C.	Hurlston & Coltman's Reports.
H. & N.	Hurlston & Norman's Reports.
H. L. C.	House of Lords Cases.
Ir. Cir. Rep.	Irish Circuit Reports.
Ir. Rep. Eq.	Irish Equity Reports.
Jac. & Wal.	Jacob & Walker's Reports.
Jebb, C. C.	Jebb's Criminal Cases (Ireland).
Keen	Keen's Reports, Chancery.
L. & C.	Leigh & Cave's Crown Cases.
Leach	Leach's Crown Cases.
L. J. Ch.	Law Journal, Chancery.
L. J. Eq.	Law Journal, Equity.
L. J. M. C.	Law Journal, Magistrates' Cases.
L. J. N. S.	Law Journal, New Series.
L. R. Ch. Ap.	Law Reports, Chancery Appeals.
L. R. C. C.	Law Reports, Crown Cases Reserved.
L. R. C. P.	Law Reports, Common Pleas
L. R. Ex.	Law Reports, Exchequer.
L. R. Q. B.	Law Reports, Queen's Bench.
Madd.	Maddock's Reports.
Man. & R.	Manning & Ryland's Reports.

McNally, Ev.	McNally's Rules of Evidence.
Moo. C. C.	Moody's Crown Cases.
M. & G.	Manning & Granger's Reports.
M. & K.	Mylne & Keen's Reports.
M. & M.	Moody & Malkin's Reports.
Moo. P. C.	Moore's Privy Council Reports.
Mo. & Ro.	Moody & Robinson's Reports.
M. & S.	Maule & Selwyn's Reports.
M. & W.	Meeson & Welsby's Reports.
Pea. R.	Peake's Reports.
Phill.	Phillips's Reports.
Phi. Ev.	Phillips on Evidence, 10th ed.
Price	Price's Reports.
Q. B.	Queen's Bench Reports.
R. N. P.	Roscoe's Nisi Prius, 18th ed.
R. & R.	Russell & Ryan's Crown Cases.
Russ. on Crimes	Russell on Crimes, 4th ed.
Selw. N. P.	Selwyn's Nisi Prius.
Simon	Simon's Reports.
Simon, N. S.	Simon's Reports. New Series.
Sim. & Stu.	Simon & Stuart's Reports.
S. L. C., or Smith, L. C.	Smith's Leading Cases, 7th ed.
Star.	Starkie's Reports.
Starkie	Starkie on Evidence, 4th ed.
S. & T.	Swabey & Tristram's Reports.
S. T., or St. Tri.	State Trials.
Story's Eq. Jur.	Story on Equity Jurisprudence.
Swab. Ad.	Swabey's Admiralty Reports.
T. R.	Term Reports.
T. E.	Taylor on Evidence, 6th ed.
Tau.	Taunton's Reports.
Ve.	Vesey's Reports.
Wigram, or Wig. Ext. Ev.	Wigram on Extrinsic Evidence.
Wills's Circ. Ev.	Wills on Circumstantial Evidence.

INTRODUCTION.

In the years 1870–1871 I drew what afterwards became the Indian Evidence Act (Act 1 of 1872). This Act began by repealing (with a few exceptions) the whole of the Law of Evidence then in force in India, and proceeded to re-enact it in the form of a code of 167 sections, which has been in operation in India since September, 1872. I am informed that it is generally understood, and has required little judicial commentary or exposition.

In the autumn of 1872 Lord Coleridge (then Attorney-General) employed me to draw a similar code for England. I did so in the course of the winter, and we settled it in frequent consultations. It was ready to be introduced early in the Session of 1873. Lord Coleridge made various attempts to bring it forward, but he could not succeed till the very last day of the Session. He said a few words on the subject on the 5th August, 1873, just before Parliament was prorogued. The Bill was thus never made public, though I believe it was ordered to be printed.

It was drawn on the model of the Indian Evidence Act, and contained a complete system of law upon the subject of Evidence.

In the latter part of 1873 Lord Coleridge was raised to his present position, and the Bill has not been proceeded with by his successors.

It is perhaps scarcely necessary to say that I obtained Lord Coleridge's consent (which was most heartily and readily given) before I published this work.

The present work is founded upon this Bill, though it differs from it in various respects. Lord Coleridge's Bill proposed a variety of amendments of the existing law. These are omitted in the present work, which is intended to represent the existing law exactly as it stands. The Bill, of course, was in the ordinary form of an Act of Parliament. In the book I have allowed myself more freedom of expression, though I have spared no pains to make my statements as precise and complete in substance as if they were intended to be submitted to the Legislature.

The Bill contained a certain number of illustrations, and Lord Coleridge's personal opinion was in their favor, though he had doubts as to the possibility of making them acceptable to Parliament. In the book I have much increased the number of the illustrations, and I have, in nearly every instance, taken cases actually decided by the Courts for the purpose. In a few instances I have invented illustrations to suit my own purposes, but I have done so only in cases in which the practice of the Courts is too well ascertained to be questioned. I think that illustrations might be used with advantage in Acts of Parliament, though I am aware that others take a different view; but, be this as it may, their use in a treatise cannot be disputed, as they not only bring into clear light the meaning of abstract generalities, but are, in many cases, themselves the authorities from which rules and principles must be deduced.

These explanations show, amongst other things, that I cannot honestly claim Lord Coleridge's authority for more than a general approval of this work. An Act of Parliament which makes the law, and a treatise which states it, differ widely, and my work may of course be open to numerous objections, which would have been easily answered if they had been urged against Lord Coleridge's Bill.

The novelty of the form and objects of the work may justify some explanations respecting it. In December, 1875, at the request of the Council of Legal Education, I undertook the duties of Professor of Common Law, at the Inns of Court, and I chose the Law of Evidence for the subject of my first course of lectures. It appeared to me that the draft Bill which I had prepared for Lord Coleridge supplied the materials for such a statement of the law as would enable students to obtain a precise and systematic acquaintance with it in a moderate space of time, and without a degree of labor disproportionate to its importance in relation to other branches of the law. No such work, so far as I know, exists; for all the existing books on the Law of Evidence are written on the usual model of English law-books, which, as a general rule, aim at being collections more or less complete of all the authorities upon a given subject, to which a judge would listen in an argument in court. Such works often become, sometimes under the hands of successive editors, the repositories of an extraordinary amount of research, but they seem to me to have the effect of making the attainment by direct study of a real knowledge of the law, or of any branch of it as a whole, almost impossible. The enormous mass of detail and illustration which they contain, and the habit into which their writers naturally fall, of introducing into them every thing which has any sort of connection, however remote, with the main subject, make these books useless for purposes of study, though they may increase their utility as works of reference. The last edition of Mr. Taylor's work on Evidence contains 1797 royal 8vo pages. To judge from the table of cases, it must refer to about 9000 judicial decisions, and it cites nearly 750 Acts of Parliament. The last edition of "Roscoe's Digest of the Law of Evidence on the trial of Actions at Nisi Prius," contains 1556 closely-printed pages. The table of cases cited consists of 77 pages, one

of which contains the names of 152 cases, which would give a total of 11,704 cases referred to. There is, besides, a list of references to statutes which fills 21 pages more. "Best's Principles of the Law of Evidence," which disclaims the intention of adding to the number of practical works on the subject, and is said to be intended to examine the principles on which the rules of evidence are founded, contains 908 pages, and refers to about 1400 cases. When we remember that the Law of Evidence forms only one branch of the Law of Procedure, and that the Substantive Law which regulates rights and duties ought to be treated independently of it, it becomes obvious that if a lawyer is to have any thing better than a familiarity with indexes, he must gain his knowledge in some other way than from existing books on the subject. No doubt such knowledge is to be gained. Experience gives by degrees, in favorable cases, a comprehensive acquaintance with the principles of the law with which a practitioner is conversant. He gets to see that it is shorter and simpler than it looks, and to understand that the innumerable cases which at first sight appear to constitute the law, are really no more than illustrations of a comparatively small number of principles; but those who have gained knowledge of this kind have usually no opportunity to impart it to others. Moreover, they acquire it very slowly, and with needless labor themselves, and though knowledge so acquired is often specially vivid and well remembered, it is often fragmentary, and the possession of it not unfrequently renders those who have it sceptical as to the possibility, and even as to the expediency, of producing any thing more systematic and complete.

Circumstances already mentioned have led me to put into a systematic form such knowledge of the subject as I had acquired, and my connection with the scheme of education established by the Inns of Court seems to im-

pose upon me the duty of doing what I can to assist in their studies those who attend my lectures. This work is the result. The labor bestowed upon it has, I may say, been in an inverse ratio to its size.

My object in it has been to separate the subject of evidence from other branches of the law with which it has commonly been mixed up; to reduce it into a compact systematic form, distributed according to the natural division of the subject-matter; and to compress into precise definite rules, illustrated, when necessary, by examples, such cases and statutes as properly relate to the subject-matter so limited and arranged. I have attempted, in short, to make a digest of the law, which, if it were thought desirable, might be used in the preparation of a code, and which, at all events, will, I hope, be useful, not only to professional students, but to every one who takes an intelligent interest in a part of the law of his country bearing directly on every kind of investigation into questions of fact, as well as on every branch of litigation.

The Law of Evidence is composed of two elements, namely, first, an enormous number of cases, almost all of which have been decided in the course of the last 100 or 150 years, and which have already been collected and classified in various ways by a succession of text writers, the most recent of whom I have already named; secondly, a comparatively small number of Acts of Parliament which have been passed in the course of the last thirty or forty years, and have effected a highly beneficial revolution in the law as it was when it attracted the denunciations of Bentham. Writers on the Law of Evidence usually refer to statutes by the hundred, but the Acts of Parliament which really relate to the subject are but few. A detailed account of this matter will be found at the end of the volume, in Note XLIX.

The arrangement of the book is the same as that of the Indian Evidence Act, and is based upon the distinction

between relevancy and proof, that is, between the question What facts may be proved? and the question How must a fact be proved assuming that proof of it may be given? The neglect of this distinction, which is concealed by the ambiguity of the word evidence (a word which sometimes means testimony and at other times relevancy), has thrown the whole subject into confusion, and has made what was really plain enough appear almost incomprehensible.

In my "Introduction to the Indian Evidence Act," published in 1872, and in speeches made in the Indian Legislative Council, I entered fully upon this matter, and I need not return to it here. I may, however, give a short outline of the contents of this work, in order to show the nature of the solution of the problem stated above at which I have arrived.

All law may be divided into Substantive Law, by which rights, duties, and liabilities are defined, and the Law of Procedure, by which the Substantive Law is applied to particular cases.

The Law of Evidence is that part of the Law of Procedure which, with a view to ascertain individual rights and liabilities in particular cases, decides:

I. What facts may, and what may not be proved in such cases;

II. What sort of evidence must be given of a fact which may be proved;

III. By whom and in what manner the evidence must be produced by which any fact is to be proved.

I. The facts which may be proved are facts in issue, or facts relevant to the issue.

Facts in issue are those facts upon the existence of which the right or liability to be ascertained in the proceeding depends.

Facts relevant to the issue are facts from the existence of which inferences as to the existence of the facts in issue may be drawn.

A fact is relevant to another fact when the existence of the one can be shown to be the cause or one of the causes, or the effect or one of the effects, of the existence of the other, or when the existence of the one, either alone or together with other facts, renders the existence of the other highly probable, or improbable, according to the common course of events.

Four classes of facts, which in common life would usually be regarded as falling within this definition of relevancy, are excluded from it by the Law of Evidence except in certain cases:

1. Facts similar to, but not specifically connected with, each other. (*Res inter alios actæ.*)
2. The fact that a person not called as a witness has asserted the existence of any fact. (*Hearsay.*)
3. The fact that any person is of opinion that a fact exists. (*Opinion.*)
4. The fact that a person's character is such as to render conduct imputed to him probable or improbable. (*Character.*)

To each of these four exclusive rules there are, however, important exceptions, which are defined by the Law of Evidence.

II. As to the manner in which a fact in issue or relevant fact must be proved.

Some facts need not be proved at all, because the Court will take judicial notice of them, if they are relevant to the issue.

Every fact which requires proof must be proved either by oral or by documentary evidence.

Every fact, except (speaking generally) the contents of a document, must be proved by oral evidence. Oral evidence must in every case be direct, that is to say, it must consist of an assertion by the person who gives it that he directly perceived the fact to the existence of which he testifies.

Documentary evidence is either primary or secondary. Primary evidence is the document itself produced in court for inspection.

Secondary evidence varies according to the nature of the document. In the case of private documents a copy of the document, or an oral account of its contents, is secondary evidence. In the case of some public documents, examined or certified copies, or exemplifications, must or may be produced in the absence of the documents themselves.

Whenever any public or private transaction has been reduced to a documentary form, the document in which it is recorded becomes exclusive evidence of that transaction, and its contents cannot, except in certain cases expressly defined, be varied by oral evidence, though secondary evidence may be given of the contents of the document.

III. As to the person by whom, and the manner in which the proof of particular fact must be made.

When a fact is to be proved, evidence must be given of it by the person upon whom the burden of proving it is imposed, either by the nature of the issue or by any legal presumption, unless the fact is one which the party is estopped from proving by his own representations, or by his conduct, or by his relation to the opposite party.

The witnesses by whom a fact is to be proved must be competent. With very few exceptions, every one is now a competent witness in all cases. Competent witnesses, however, are not in all cases compelled or even permitted to testify.

The evidence must be given upon oath, or in certain excepted cases without oath. The witnesses must be first examined in chief, then cross-examined, and then re-examined. Their credit may be tested in certain ways, and the answers which they give to questions affecting their credit may be contradicted in certain cases and not in others.

This brief statement will show what I regard as constituting the Law of Evidence properly so called. My view of it excludes many things which are often regarded as forming part of it. The principal subjects thus omitted are as follows:—

I regard the question, What may be proved under particular issues? (which many writers treat as part of the Law of Evidence) as belonging partly to the subject of pleading, and partly to each of the different branches into which the Substantive Law may be divided.

A is indicted for murder, and pleads Not Guilty. This plea puts in issue, amongst other things, the presence of any state of mind describable as malice aforethought, and all matters of justification or extenuation.

Starkie and Roscoe treat these subjects at full length, as supplying answers to the question, What can be proved under an issue of Not Guilty on an indictment for murder? Mr. Taylor does not go so far as this; but a great part of his book is based upon a similar principle of classification. Thus chapters i. and ii. of Part II. are rather a treatise on pleading than a treatise on evidence.

Again, I have dealt very shortly with the whole subject of presumptions. My reason is that they also appear to me to belong to different branches of the Substantive Law, and to be unintelligible, except in connection with them. Take for instance the presumption that every one knows the law. The real meaning of this is that, speaking generally, ignorance of the law is not taken as an excuse for breaking it. This rule cannot be properly appreciated if it is treated as a part of the Law of Evidence. It belongs to the Criminal Law. In the same way numerous presumptions as to rights of property (in particular easements and incorporeal hereditaments) belong not to the Law of Evidence but to the Law of Real Property. The only presumptions which, in my opinion, ought to find a place in the Law of Evidence, are those which relate to

facts merely as facts, and apart from the particular rights which they constitute. Thus the rule, that a man not heard of for seven years is presumed to be dead, might be equally applicable to a dispute as to the validity of a marriage, an action of ejectment by a reversioner against a tenant *pur auter vie*, the admissibility of a declaration against interest, and many other subjects. After careful consideration, I have put a few presumptions of this kind into a chapter on the subject, and have passed over the rest as belonging to different branches of the Substantive Law.

Practice, again, appears to me to differ in kind from the Law of Evidence. The rules which point out the manner in which the attendance of witnesses is to be procured, evidence is to be taken on commission, depositions are to be authenticated and forwarded to the proper officers, interrogatories are to be administered, &c., have little to do with the general principles which regulate the relevancy and proof of matters of fact. Their proper place would be found in codes of civil and criminal procedure.

A similar remark applies to a great mass of provisions as to the proof of certain particulars. Under the head of "Public Documents," Mr. Taylor gives amongst other things a list of all, or most, of the statutory provisions which render certificates or certified copies admissible in particular cases.

To take an illustration at random, section 1458 begins thus: "The registration of medical practitioners, under the Medical Act of 1858, may be proved by a copy of the 'Medical Register,' for the time being, purporting," &c. I do not wish for a moment to undervalue the practical utility of such information, or the industry displayed in collecting it; but such a provision as this appears to me to belong not to the Law of Evidence, but to the law relating to medical men. It is matter rather for an index

or schedule than for a legal treatise, intended to be studied, understood, and borne in mind in practice.

On several other points the distinction between the Law of Evidence and other branches of the law is more difficult to trace. For instance, the law of estoppel, and the law relating to the interpretation of written instruments, both run into the Law of Evidence. I have tried to draw the line by dealing in the case of estoppels with estoppels *in pais* only, to the exclusion of estoppels by deed and by matter of record, which must be pleaded as such; and in regard to the law of written instruments by stating those rules only which seemed to me to bear directly on the question whether a document can be supplemented or explained by oral evidence.

The result is no doubt to make the statement of the law much shorter than is usual. I hope, however, that competent judges will find that, as far as it goes, the statement is both full and correct. As to brevity, I may say, in the words of Lord Mansfield: "The law does not consist of particular cases, but of general principles which are illustrated and explained by those cases."*

Every one will express somewhat differently the principles which he draws from a number of illustrations, and this is one source of that quality of our law which those who dislike it describe as vagueness and uncertainty, and those who like it as elasticity. I dislike the quality in question, and I used to think that it would be an improvement if the law were once for all enacted in a distinct form by the Legislature, and were definitely altered from time to time as occasion required. For many years I did my utmost to get others to take the same view of the subject, but I am now convinced by experience that the unwillingness of the Legislature to undertake such an operation proceeds from a want of confidence in its

* R. *v.* Bembridge, 3 Doug. 332.

power to deal with such subjects, which is neither unnatural nor unfounded. It would be as impossible to get in Parliament a really satisfactory discussion of a bill codifying the Law of Evidence as to get a committee of the whole House to paint a picture. It would, I am equally well satisfied, be quite as difficult at present to get Parliament to delegate its powers to persons capable of exercising them properly. In the meanwhile the Courts can decide only upon cases as they actually occur, and generations may pass before a doubt is set at rest by a judicial decision expressly in point. Hence, if any thing considerable is to be done towards the reduction of the law to a system, it must, at present at least, be done by private writers.

Legislation proper is under favorable conditions the best way of making the law, but if that is not to be had, indirect legislation, the influence on the law of judges and legal writers who deduce, from a mass of precedents, such principles and rules as appear to them to be suggested by the great bulk of the authorities, and to be in themselves rational and convenient, is very much better than none at all. It has, indeed, special advantages, which this is not the place to insist upon. I do not think the law can be in a less creditable condition than that of an enormous mass of isolated decisions, and statutes assuming unstated principles; cases and statutes alike being accessible only by elaborate indexes. I insist upon this because I am well aware of the prejudice which exists against all attempts to state the law simply, and of the rooted belief which exists in the minds of many lawyers that all general propositions of law must be misleading, and delusive, and that law-books are useless except as indexes. An ancient maxim says: "*Omnis definitio in jure periculosa.*" Lord Coke wrote: "It is ever good to rely upon the books at large; for many times *compendia sunt dispendia*, and *Melius est petere fontes quam sectari*

rivulos." Mr. Smith chose this expression as the motto of his "Leading Cases," and the sentiment which it embodies has exercised immense influence over our law. It has not perhaps been sufficiently observed that when Coke wrote, the "books at large," namely the "Year Books" and a very few more modern reports, contained probably about as much matter as two, or at most three, years of the reports published by the Council of Law Reporting; and that the *compendia* (such books, say, as Fitzherbert's "Abridgment") were merely abridgments of the cases in the "Year Books" classified in the roughest possible manner, and much inferior both in extent and arrangement to such a book as Fisher's "Digest." *

In our own days it appears to me that the true *fontes* are not to be found in reported cases, but in the rules and principles which such cases imply, and that the cases themselves are the *rivuli*, the following of which is a *dispendium*. My attempt in this work has been emphatically *petere fontes*, to reduce an important branch of the law to the form of a connected system of intelligible rules and principles.

Should the undertaking be favorably received by the profession and the public, I hope to apply the same process to some other branches of the law; for the more I study and practise it, the more firmly am I convinced of the excellence of its substance and the defects of its form. Our earlier writers, from Coke to Blackstone, fell into the error of asserting the excellence of its substance in a fulsome and exaggerated strain, whilst they showed a total

* Since the beginning of 1865 the Council has published eighty-six volumes of Reports. The Year Books from 1307–1535, 228 years, would fill not more than twenty-five such volumes. There are also ten volumes of Statutes since 1865 (May, 1876). There are now (February, 1877) at least ninety-three volumes of Reports and eleven volumes of Statutes.

insensibility to defects, both of substance and form, which in their time were grievous and glaring. Bentham seems to me in many points to have fallen into the converse error. He was too keen and bitter a critic to recognize the substantial merits of the system which he attacked; and it is obvious to me that he had not that mastery of the law itself which is unattainable by mere theoretical study, even if the student is, as Bentham certainly was, a man of talent, approaching closely to genius.

During the last twenty-five years Bentham's influence has to some extent declined, partly because some of his books are like exploded shells, buried under the ruins which they have made, and partly because under the influence of some of the ablest and most distinguished of living authors, great attention has been directed to legal history, and in particular to the study of Roman Law. It would be difficult to exaggerate the value of these studies, but their nature and use is liable to be misunderstood. The history of the Roman Law no doubt throws great light on the history of our own law; and the comparison of the two great bodies of law, under one or the other of which the laws of the civilized world may be classified, cannot fail to be in every way most instructive; but the history of bygone institutions is valuable mainly because it enables us to understand, and so to improve existing institutions. It would be a complete mistake to suppose either that the Roman Law is in substance wiser than our own, or that in point of arrangement and method the Institutes and the Digest are any thing but warnings. The pseudo-philosophy of the Institutes, and the confusion of the Digest, are, to my mind, infinitely more objectionable than the absence of arrangement and of all general theories, good or bad, which distinguish the Law of England.

However this may be, I trust the present work will show that the law of England on the subject to which it

refers is full of sagacity and practical experience, and is capable of being thrown into a form at once plain, short, and systematic.

I wish, in conclusion, to direct attention to the manner in which I have dealt with such parts of the Statute Law as are embodied in this work. I have given, not the very words of the enactments referred to, but what I understand to be their effect, though in doing so I have deviated as little as possible from the actual words employed. I have done this in order to make it easier to study the subject as a whole. Every Act of Parliament which relates to the Law of Evidence assumes the existence of the unwritten law. It cannot, therefore, be fully understood, nor can its relation to other parts of the law be appreciated till the unwritten law has been written down so that the provisions of particular statutes may take their places as parts of it. When this is done, the Statute Law itself admits of, and even requires, very great abridgment. In many cases the result of a number of separate enactments may be stated in a line or two. For instance, the old Common Law as to the incompetency of certain classes of witnesses was removed by parts of six different Acts of Parliament — the net result of which is given in five short articles (106–110).

So, too, the doctrine of incompetency for peculiar or defective religious belief has been removed by many different enactments, the effect of which is shown in one article (123).

The various enactments relating to documentary evidence (see Ch. X.) appear to me to become easy to follow and to appreciate when they are put in their proper places in a general scheme of the law, and arranged according to their subject-matter. By rejecting every part of an Act of Parliament except the actual operative words which constitute its addition to the law, and by setting it (so to speak) in a definite statement of the unwritten law

of which it assumes the existence, it is possible to combine brevity with substantial accuracy and fulness of statement to an extent which would surprise those who are acquainted with Acts of Parliament only as they stand in the Statute Book.* At the same time I should warn any one who may use this book for the purposes of actual practice in or out of court, that he would do well to refer to the very words of the statutes embodied in it. It is very possible that, in stating their effect instead of their actual words, I may have given in some particulars a mistaken view of their meaning.

Such are the means by which I have endeavored to make a statement of the Law of Evidence which will enable not only students of law, but I hope any intelligent person who cares enough about the subject to study attentively what I have written, to obtain from it a knowledge of that subject at once comprehensive and exact — a knowledge which would enable him to follow in an intelligent manner the proceedings of Courts of Justice, and which would enable him to study cases and use text-books of the common kind with readiness and ease. I do not say more than this. I have not attempted to follow the matter out into its minute ramifications, and I have avoided reference to what after all are little more than matters of curiosity. I think, however, that any one who makes himself thoroughly acquainted with the contents of this book, will know fully and accurately all the leading principles and rules of evidence which occur in actual practice.

If I am entitled to generalize at all from my own experience, I think that even those who are already well

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* Twenty articles of this work represent all that is material in the ten Acts of Parliament, containing sixty-six sections, which have been passed on the subject to which it refers. For the detailed proof of this, see Appendix, Note XLVIII.

acquainted with the subject will find that they understand the relations of its different parts, and therefore the parts themselves more completely than they otherwise would, by being enabled to take them in at one view, and to consider them in their relation to each other.

J. F. S.

4, Paper Buildings, Temple,
May, 1876.

PREFACE TO THE THIRD EDITION.

THE first edition of this work sold so quickly that it was necessary to publish a second edition before it was possible to make any substantial alterations in the first, and indeed before I had had time to study and consider the criticisms made upon it.

The second edition has been disposed of as quickly as the first, and it has been exceedingly difficult in the midst of many other engagements to give as much attention to the revision and correction of the book as I could have wished. I have, however, done my best.

I have very carefully considered the different criticisms which have been made upon my book. The most important of these were contained in an article, in the "Fortnightly Review" for September, by Mr. Frederick Pollock; and in a careful and elaborate series of articles, entitled "An English Evidence Code," published in the "Solicitors' Journal" in September and October. I wish to acknowledge my obligations to each of these critics. They have detected and enabled me to correct a considerable number of blemishes; and I am surprised and gratified to find that they do not allege that they have discovered any serious error or unintentional omission. I have adopted some, though not all, of their suggestions. I may mention the most important.

The blemishes detected by them are, I think, reducible to one principle. They are all cases in which I failed to draw as precisely as I should have drawn it the line be-

tween the theory on which the rules of evidence depend and the rules of evidence themselves. It is more difficult to do so than might be imagined by a person who had not had to go through the process of first deducing the theory from the rules, and then adjusting the rules to the theory. In performing this double operation it is hardly possible not to attribute to particular matters a degree of importance and prominence proportioned rather to the impression which they made on one's own mind when they first occurred to it than to the impression which they are likely to make on other minds in studying the subject. The criticisms I have mentioned have enabled me to perceive, and I hope to remedy, some of the defects due to this cause. In particular I have omitted some of the definitions inserted in the first edition, and modified others; and I have introduced several changes in the way of treating the subject of relevancy which I think bring out not only my own meaning, but the actual character and construction of the law more clearly than before. The chief object of these alterations has been to mark as clearly as possible the distinction between the theory of relevancy, which is really a branch of logic, and the particular rules founded upon it which form the Law of Evidence. This is effected by two alterations. First, by changing the position of the definition of relevancy, and dividing the part of it which is required for practical purposes from the part which expresses the logical theory on which the practice proceeds. Secondly, by changing throughout the whole of Part I. the phrase "is relevant," or "is not relevant," into "is deemed to be relevant," or "to be irrelevant." The object of this change is to mark a distinction best explained by illustrations. Both evidence of an alibi and evidence of the good character of a prisoner would be admitted on a trial, say for murder; whereas a dying declaration by some deceased person, that he and not the

prisoner had committed the murder, would be rejected. On examining the articles contained in Part I. it will be found that evidence of an alibi would be admissible only under Articles 1 and 2, which provide in general terms that facts relevant to the issue may be proved, and define relevant facts as including, amongst others, facts showing that a given fact could not have happened. The alibi therefore may be proved, because it actually is relevant to the fact in issue, *i.e.* the alleged murder.

The previous good character (which in strictness means reputation) of the accused can hardly be said to be actually relevant to his guilt. The possession of a good reputation does not in the common course of events prove that a man cannot have committed a crime, or that it is in any appreciable degree improbable that he did so. Still the prisoner is allowed, if he likes, to prove the fact for what it is worth. In other words, the fact that a man has a good character is treated by the law as a matter which either has or may have something to do with the question of guilt or innocence. In other words, it is deemed to be relevant, though it may not actually be relevant. On the other hand, a dying confession of murder made by a third person is deemed to be irrelevant, though it is actually relevant. Such a confession can hardly be false except under extraordinary circumstances. It can hardly be caused by any thing except a consciousness of guilt, and it is impossible to doubt that any one who was guided by common sense alone would wish to know the fact that it had been made when he had to determine upon the guilt of another. Rightly or wrongly, however, evidence of such a confession is by our law excluded. The fact that it was made is kept from the judge and jury. It is thus treated as being or is deemed to be irrelevant.*

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* As a curious and instructive instance of the way in which rules of evidence vary in their effect, I may mention the following circum-

It has been suggested with great plausibility that the simplest way of stating the Law of Evidence would be to omit all reference to the relevancy of facts, and to lay down a series of rules as to the classes of facts of which proof is or is not admissible. Such a way of treating the subject might perhaps be more convenient in an Act of Parliament than the arrangement which I have adopted; but I do not think it would state the matter with equal point and vigor, nor do I think it would represent the actual state of the law with equal accuracy.

My study of the subject, both practically and in books, has convinced me that the doctrine that all facts in issue and relevant to the issue, and no others, may be proved, is the unexpressed principle which forms the centre of and gives unity to all the express negative rules which form the great mass of the law. To me these rules always appeared to form a hopeless mass of confusion, which might be remembered by a great effort, but could not be understood as a whole, or reduced to system, until I had meditated for months upon the question, What is this evidence which you tell me hearsay is not? The expression "hearsay is not evidence" seemed to assume that I knew by the light of nature what evidence was, but I

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stance: A Punjab district officer lately told me that it had come to be commonly known in the Peshawur division that a dying declaration as to the cause of the declarant's death is admitted in proof of the matter stated. The effect of this was, that whenever a man was mortally wounded, and found himself dying (a very common incident in that part of the world), he took the opportunity of making a dying declaration calculated to pay off as many old scores of vengeance as possible. The supposed ground of the English rule is, that the solemn thoughts connected with approaching death are equivalent to the sanction of an oath. This is very far indeed from being the way in which a dying Punjabee looks at the subject. His reflection on such an occasion is, "This is my last chance of doing So-and-so, my old family enemy, a bad turn, and I will on no account miss it."

perceived at last that that was just what I did not know. I found that I was in the position of a person who, having never seen a cat, is instructed about them in this fashion: "Lions are not cats in our sense of the word, nor are tigers nor leopards, though you might be inclined to think they were." Show me a cat to begin with, and I at once understand both what is meant by saying that a lion is not a cat, and why it is possible to call him one. Tell me what evidence is, and I shall be able to understand why you say that this and that class of facts are not evidence. The question "What is evidence?" constantly asked, gradually disclosed the ambiguity of the word. To describe a matter of fact as "evidence" in the sense of testimony is obviously nonsense. No one wants to be told that hearsay, whatever else it is, is not testimony. What then does the word mean? The only possible answer is: It means that the one fact either is or else is not considered by the person using the expression to furnish a premiss or part of a premiss from which the existence of the other is a necessary or probable inference — in other words, that the one fact is or is not relevant to the other. When the inquiry is pushed further, and the nature of relevancy has to be considered in itself, and apart from legal rules about it, we are led to inductive logic, which shows that judicial evidence is only one case of the general problem of science — namely, inferring the unknown from the known. As far as the logical theory of the matter is concerned, this is an ultimate answer.

If now we turn from the logical to the legal theory, the case is altered. The logical theory was cleared up by Mr. Mill. Bentham and some other * writers had more or

* See, *e.g.*, that able and interesting book "An Essay on Circumstantial Evidence," by the late Mr. Wills, father of Mr. Alfred Wills, Q.C. Chief Baron Gilbert's work on the Law of Evidence is founded on Locke's "Essay," much as my work is founded on Mill's "Logic."

less discussed the connection of logic with the rules of evidence. But I am not aware that it occurred to any one before I published my "Introduction to the Indian Evidence Act" to point out in detail the very close resemblance which exists between Mr. Mill's theory and the existing state of the law.

The law, as distinguished from the theory of judicial evidence, is the work of many generations of judges, who have by degrees worked it out with a more or less indistinct and partial perception of the theory on which it ought to be founded.

Patient study of the subject seemed to me to show that, making allowance for some defects and some excesses, the cases thus decided collectively occupied very nearly the same area as would be occupied by the logical application of the simple principle just stated — that facts in issue and facts relevant to that issue may be proved, and no others.

These cases might be compared to the astronomical observations which showed what in fact had been the positions of the planets for a long series of years; the theory (the ludicrous disproportion of the comparison affords the only excuse for making it) to the discovery that these positions may be shortly described by saying that the planets move round the sun in ellipses, overstepping the line at some points and receding from it at others. Facts actually relevant correspond to the points on the elliptical part of the orbit; facts deemed to be relevant, though they are not, to the points outside the ellipse but touched by the orbit; facts deemed to be irrelevant, though really relevant, correspond to the points upon the ellipse from which the orbit recedes; but the statement that the orbit is (exceptions excepted) elliptical gives unity and coherency to the whole subject.

I have made one or two additions to the contents of my first edition. The effect of the Bankers' Books Evi-

dence Act, 1876 (39 & 40 Vict. c. 48), is given in Articles 36, 37, 38, 71 (*f*), and 118. This is the only statute passed in the last session which affects the Law of Evidence. I have also added references to a few cases, some of which I had overlooked in my first edition, and others of which have been decided since it was published.

In the first edition I omitted all reference to affidavits, because I did not see clearly how to deal with them. This omission has been pointed out by several critics. Upon further consideration, I have added to the title of Chapter XVI. ("Of the Examination of Witnesses") the words "Of Taking Evidence," and I have inserted articles relating to taking evidence by affidavit and under commissions. I have also removed to a separate chapter the articles relating to depositions, which in the first edition came in rather awkwardly under the head of hearsay evidence, though not, I think, incorrectly.

With respect to the arrangement of certain parts of the book, it has been suggested that the articles in Chapter I. are arranged at random and on no principle. They are, in fact, arranged on the principle of taking the facts actually in issue as a starting-point, and referring to other classes of facts in the order of their proximity to the facts in issue. The nearest are those which form part of the same transaction. Acts done by conspirators in execution of their common purpose are not indeed part of the conspiracy or agreement, which is supposed to be actually in issue, but in all common cases are the facts from which the conspiracy has to be inferred. They thus stand in a very close relation to the actual facts in issue. The same is true of the facts admitted in the proof of a title or a custom. The fact that A. conveyed to B. the land which was conveyed by B. to C., or that on a particular occasion the custom of Borough English was observed in a particular manor, are not directly in issue when C.'s title or the existence of the custom of Borough

English are* in question; but they are parts of a complex whole, which is denoted by each of the words custom and title. Motive, preparation, subsequent conduct lead up to or away from the facts in issue, when such facts are parts of human conduct. Explanatory and introductory facts stand a step farther off.

This explanation I see is required, because its absence has puzzled an acute critic.

One other point of the same kind I may mention. Why, it is asked, put judicial notice under the general head of Proof? Is not this a strange heading: "Part II. Of Proof. — Chapter I. Facts which need not be Proved"? There is an apparent verbal opposition, no doubt, which I have removed by a change in the title of the chapter, but the opposition is only apparent and verbal. I believe the arrangement to be logically correct, and I have accordingly maintained it. By Proof I mean the means used of making the Court aware of the existence of a given fact, and surely the simplest possible way of doing so is to remind the Court that it knows it already. It is like proving that it is raining by telling the Judge to look out of the window. It has been said that judicial notice should come under the head of Burden of Proof, but surely this is not so. The rules as to burden of proof show which side ought to call upon the Court to take judicial notice of a particular fact, but the act of taking judicial notice, of consciously recalling to

* In strictness, title and custom are rather inferences from facts than facts; but it is convenient, and is in accordance with common usage, to speak of them as facts. I have been led to modify the definition of "fact" by an acute remark made on this subject in the "Solicitors' Journal." The real object of the definition was to show that I used the word "fact" so as to include states of mind. It is very common to say, "This is not mere opinion, this is a matter of fact;" or, "This is not a fact, it is only a statement." That A holds a particular opinion or says certain words is just as much a fact as that he strikes a blow.

the mind a fact known, but not for the moment adverted to, is an act of precisely the same kind as listening to the evidence of a witness or reading a document, — that is, it belongs to the general head of proof.

The only other alteration connected with the arrangement of the book which I need notice relates to the arrangement of the chapter on Hearsay. It is said to be contrary to the common use of language to treat the rules as to the admissibility of judgments and depositions as exceptions from the rule excluding hearsay. No doubt there is some weight in this remark, especially as regards depositions. It does sound odd to say that the statements in a judgment or decree are hearsay, but the fault lies with the word hearsay, which is so well established that its existence cannot practically be overlooked in any statement of the law as it is. Define the exclusive rule a little more widely and the propriety of treating the admissibility of judgments as exceptions from it becomes apparent. The rule I think ought to be framed in two branches — one excluding hearsay in the popular sense of the word, the other excluding matter recorded in documents for public information or otherwise. A little thought will show that the contents of the "Times" newspaper, or of a parliamentary blue-book, or of the report of a Royal Commission are excluded on the same principle as statements made in conversation by a private person. The object is perhaps hardly so much to prevent inaccuracy as to compel the production before the Court of the evidence on which their conclusion must ultimately be based. The rule which admits the contents of a judgment is as much an exception to one branch of the rule as the rule which admits a dying declaration is an exception to the other. In the present edition I have accordingly remodelled the exclusive rule, so as to include both branches. I have also divided the chapter into two sections, containing respectively the exceptions to the first

and the exceptions to the second branch of the exclusive rule as remodelled.

The principal importance of this work lies in its bearing on the great question of codification. It is not for me to say how far my book can be regarded as affording a practical proof of the possibility of that process as giving a distinct, complete, and systematic statement of the branch of the law which is its subject, but the experience gained by writing it and by considering the criticisms made upon it, as well as by attempts which I have made and am still engaged upon to apply the same process to other branches of the law, lead me to feel very serious doubts whether it would be desirable to take the Law of Evidence as the first subject on which to try the experiment of codification. I doubt whether any branch of the law is so difficult to arrange in a completely satisfactory manner. Probably none depends so directly on questions lying outside of law. A code not based on the principles of logic would in my opinion be mischievous, but the attempt to impose a particular logical theory either upon the Judges and the legal profession by Act of Parliament would be hazardous. If that way of treating the subject which has been adopted in this book is the right one, it will be gradually recognized and adopted as such by the profession, and might ultimately form the basis of a code. I must in candor add that, since I drew the Indian Evidence Act in 1870, I have learnt so much from both hostile and friendly critics as to the way of treating the subject, that I should be sorry to see any theory about it finally adopted until it had been recognized as the true one by the best of all possible tests, its influence on and acceptance by the profession, whose cordial support is absolutely essential to the success of any attempt to codify the law, either by legislation or by private enterprise.

I would, however, suggest that this book might be made subservient to legislation in a way which, if not so

ambitious as codification, would at all events be exceedingly useful. On looking through it, it is easy to see two things. First, the statute law relating to evidence might be consolidated into a single Act with great advantage. Next, a variety of detailed amendments in the law might and ought to be made which would very greatly improve the system and prepare the way for a code of the Law of Evidence if either my theory on the subject or any other should be tacitly adopted by the profession as the proper way of stating the law. I beg to offer to the public the following notes, which might with very little trouble be reduced into the form of heads of a Bill to consolidate and amend the Law of Evidence.

The notes follow the order of the articles in my book to which they apply.

Article 2. Note II. — Mr. Taylor adopts from Professor Greenleaf the statement, that "the law excludes, on public grounds, evidence which is offensive or indecent to public morals or to the feelings of third persons." For the reasons given in the note I fear this statement of the law is not correct. But if it is not the law, ought not the Judges to have some such power? If it is thought impracticable to surround such a power by the necessary safeguards against its abuse, this is an additional reason for guarding against the abuse of cross-examination to credit.

Article 8. Note V. — Should not the whole of a complaint be given in evidence?

Article 42. — As a general rule, statements contained in judgments as to matters of fact are not evidence of the matter stated as between strangers to the judgment except in the case of judgments of the Court of Admiralty condemning a ship as prize (Geyer *v.* Aguilar, 7 T. R. 681), In the case quoted the rule worked gross injustice, and it is opposed to all analogy, and probably based on a mistake, as Lord Eldon points out in Lothian *v.* Henderson,

3 B. & P. 545. Why should not such judgments be put on the same footing as others?

ARTICLE 57. — In R. *v.* Rowton, 1 L. & C. 520, it was held that evidence of character in a criminal trial must be confined to evidence of reputation as distinguished from disposition. The monstrous consequences of this rule, and the fact that it is habitually and indeed unavoidably set at nought, are pointed out in the Appendix, Note XXV. Why not enact that in such cases evidence may be given of the prisoner's general disposition, as well as of his reputation, but not of particular facts by which either is shown?

ARTICLE 64. — As the law stands, an admission of the contents of a document is primary evidence as against the person who makes it (Slatterie *v.* Pooley, 6 M. & W. 664), and the contents of a document may thus be proved against a person without his having had notice to produce it. The impolicy of this rule has often been remarked upon. The case in which it was affirmed, and others which preceded it, seem to show that it was established, in part at least, in order to find a way of proving documents which were excluded by the operation of the stamp laws. As the law as to the effect of the want of a proper stamp has been altered, this reason for the rule no longer exists. The only effect of removing it would be that notice to produce would be (as it surely ought to be) required before the contents of a document can be proved by an admission.

ARTICLE 89. — The rule that an alteration made in a deed by a stranger, while the document is in the custody of the person who produces it, but without his knowledge or consent, prevents him from claiming under it (Davidson *v.* Cooper, 11 M. & W. 778, 13 M. & W. 343, and see Aldous *v.* Cornwell, L. R. 3 Q. B. 573), seems to be a relic of a time when almost idolatrous respect was paid to deeds. If a man can sue on a deed which has been destroyed, why not on one which has been altered?

Article 91, Clauses 7 and 8. — As to the cases in which a testator's statements as to the meaning of his will are admitted and rejected in construing the will, see Appendix, Note XXXIII. Several Judges of the highest eminence have expressed an opinion adverse to the present rule. Why should it not be permissible to give the same evidence for the purpose of reforming a mistake in a will as for the purpose of reforming a mistake in an agreement in writing? There is no real fear that the Court would not be sufficiently jealous on the subject.

Articles 114, 115. — The doubts as to the competency of a grand juror to testify as to what passes between him and his fellows, and as to the privilege of special pleaders and licensed conveyancers, might perhaps be worth setting at rest.

Article 117. — Surely communications made in professional confidence to clergymen of all denominations ought to be privileged. A clergyman asked to disclose what has been said to him in confession is sure to refuse to answer. If he does so, he has public sympathy with him, and the administration of justice is so far discredited. The improbability that any advantage comparable to this disadvantage will ever be obtained from the existing law (to say nothing of its doubtfulness) is very great indeed.

Article 129 and Note XLVI. — This article and note refer to the law as to cross-examination to credit. I have nothing to add to what is said in the note, except that recent notorious abuses of the power of cross-examining to credit appear to me to place in a strong light the importance of the suggestion there made.

These amendments, slight and few in number as they are, are the only ones which I should feel disposed to suggest in the common law on the subject of evidence. The statute law might, I think, be recast with very great advantage. A detailed statement of its present condition will be found in the Appendix, Note XLVIII. On reference to that

note and to the articles of this work therein referred to, it will be found that by proper management the greater part of ten Acts of Parliament might be repealed, and re-enacted in a single Act of twenty sections arranged upon an intelligible system. This process would afford a natural opportunity for removing a number of minor blemishes in the law, of which I will notice a few.

Articles 106–109. — These articles give the result of an odd amalgam of common and statute law, the component parts of which are described in the Appendix, Notes XXXIX., XL., XLI. The last paragraph of XLI. points out a flaw worth removing, and the same may be said of the note to Article 110, which gives the effect of 16 & 17 Vict. c. 83, s. 3.

The enactment of these four articles would supersede expressly common-law principles which have been eaten away bit by bit by five or six Acts of Parliament containing at least two notable flaws.

In the same way Articles 123, 124 are the short equivalents of a very complicated set of enactments as to oaths.

Articles 131 and 132 are meant to represent 17 & 18 Vict. c. 125, secs. 22–23, as to which see Appendix, Note XLVII. Of the twenty-second section the Lord Chief Justice of England said, with obvious truth, "There has been a great blunder in the drawing of it and on the part of those who adopted it."

I need say nothing as to the importance of bringing into one Act arranged in a consecutive manner not only the material parts of ten Acts which deal with the subject, but a large number of enactments scattered all over the statute book.

It would be a great convenience to the profession to re-enact the different sections relating to taking the depositions of witnesses in a better form than their present one. The existing statutes are wandering, diffuse, and incoherent to the last degree, and many questions have

been raised on their meaning. On this subject see Articles 140, 141, 142.

The law as to commissions to take evidence is in a most confused state. See Article 125 and the footnote.

It is difficult to imagine an odder arrangement than one which sends a person wishing to know the law as to the issue of commissions to take evidence to an Act for the government of India, the main purpose of which was the establishment of a governor-general in council.

Surely, too, it is a great omission in our law that there should be no provision for taking evidence under a commission in criminal cases, except in one rare class of misdemeanors.

Lastly, might it not be wise to authorize the superior courts to give a certificate, if they thought proper to do so, of the existence of any matter of fact which had been duly established before them in a suit *bonâ fide* contested, on the application of the successful party, such certificate to be evidence of the matters stated in it, and raising a presumption of their truth whenever they are brought into question in any subsequent proceedings? It seems monstrous that, when Orton had been prosecuted to conviction for perjury, the fact that he was Orton and not Tichborne, and the fact that Tichborne was dead, should have been, as far as the law went, open to future dispute, and that it should have been necessary to procure a private Act of Parliament to furnish satisfactory proof of these facts for future use.

My friend Mr. J. C. Lawrance, of the Midland Circuit, has been good enough to prepare the new index added to this edition. It will, I hope, very greatly facilitate reference, and so add to the utility of the book for purposes of actual practice.

J. F. S.

TEMPLE,
Jan. 27, 1877.

A DIGEST

OF

THE LAW OF EVIDENCE.

PART I.

RELEVANCY.

CHAPTER I.

PRELIMINARY.

ARTICLE 1.*

DEFINITION OF TERMS.

IN this book the following words and expressions are used in the following senses unless a different intention appears from the context.

"Judge" includes all persons authorized to take evidence, either by law or by the consent of the parties.

"Fact" includes the fact that any mental condition of which any person is conscious exists.

{Wheelden *v.* Wilson, 44 Me. 1.}

"Document" means any substance having any matter expressed or described upon it by marks capable of being read.

"Evidence" means—

(1) Statements made by witnesses in court under a legal sanction, in relation to matters of fact under inquiry;

* See Appendix, Note I.

such statements are called oral evidence:

(2) Documents produced for the inspection of the Court or judge;

such documents are called documentary evidence.

"Conclusive Proof" means evidence upon the production of which, or a fact upon the proof of which, the judge is bound by law to regard some fact as proved, and to exclude evidence intended to disprove it.

"A Presumption" means a rule of law that Courts and judges shall draw a particular inference from a particular fact, or from particular evidence, unless and until the truth of such inference is disproved.

{This "presumption" constitutes what is called a *prima facie* case, and, in a civil action, so establishes a fact in dispute as, if not rebutted, to require a verdict in accordance therewith, Kelley *v.* Jackson, 6 Pet. (U. S.) 632; but not in a criminal case, Chaffee *v.* United States, 18 Wall. (U. S.) 516. See, however, 1 Greenl. Ev. § 81 *e*, as to the last point, that there are facts, such as sanity, and certain negative allegations, which are sufficiently proved by this presumption even in a criminal case.}

The expression "facts in issue" means—

(1) All facts which, by the form of the pleadings in any action, are affirmed on one side and denied on the other:

(2) In actions in which there are no pleadings, or in which the form of the pleadings is such that distinct issues are not joined between the parties, all facts from the establishment of which the existence, non-existence, nature, or extent of any right, liability, or disability asserted or denied in any such case would by law follow.

The word "relevant" means that any two facts to which it is applied are so related to each other that according to the common course of events one either taken by itself or in connection with other facts proves or renders probable the past, present, or future existence or non-existence of the other.

{This definition may perhaps be as good as any that can be given. See Appendix, Note I. But the question recurs, What is "so related"? and this is substantially identical with the question, What is relevant? Relevancy is generally hereinafter used by the author in the sense of admissibility. All admissible evidence must be relevant, but all relevant evidence is not therefore admissible. Thus, privileged communications and confessions, and all evidence excluded by public policy, may be in the highest degree relevant, yet they are inadmissible. See *post*, Ch. IV.

There seems to be no general test of relevancy. What is relevant on one issue is not relevant on another. When the issue is fraud, great latitude is allowed in the proof of circumstances. Reels *v.* Knights, 8 Mar. (La.) N. S. 267. Circumstances so trivial and remote in themselves, that, if individually and separately offered, they might justly be rejected, may, from their multitude and relation, become important and obviously relevant. State *v.* Watkins, 9 Conn. 52. Especially, on cross-examination, when it becomes important to show who and what and how related to the case the witness is or may be, are many questions relevant which otherwise would not be relevant. The decisions of courts of last resort afford no data, and have no such uniformity or similarity as to afford the grounds for a general rule. What they decide to be relevant or irrelevant is or is not so, for the particular case and within their jurisdiction, and to that extent only. A few cases, showing what has and what has not been deemed relevant, will serve to illustrate this remark. It will generally be found that the circumstances of the parties to the suit at the time of the controversy are relevant. On the trial of an action for work done and materials supplied to certain houses on the orders of a third person, the defendant denying that he is the owner of the houses, or the real principal, evidence is relevant that other persons had received orders from the defendant to do work at the same houses, without showing that the plaintiff knew of those orders at the time he did his work. But if the orders had been to do work upon other houses, it seems they would not have been relevant. Woodman *v.* Buchanan, 5 L. R. Q. B. 285; Dowling *v.* Dowling, 10 Ir. Law, 236. The question being whether A loaned money to B, the fact of A's poverty at the time of the alleged loan is relevant. Dowling *v.* Dowling, 10 Ir. Law, 236. The question being to which of two persons the plaintiff gave credit, the facts that he had already before brought suit upon the same demand against one, is relevant, as showing that he did not give credit to the other. Head *v.* Taylor, Litt. Sel. Cas. (Ky.) 257. On proof that the defendant was at a certain place where he might have committed an alleged trespass, it is relevant to show that he was there from another motive than to

commit it. Prindle *v.* Glover, 4 Conn. 266; Tracy *v.* McMannus, 58 N. Y. 257. The fact that A usually procured and paid for the board of the workmen in his employ at other boarding-houses, is relevant on the question of his indebtedness for the board of those boarding with B. Dwight *v.* Brown, 9 Conn. 83. The question being whether A caused B to miscarry, by violence, the fact that B had several times before miscarried, without violence, is relevant. Slattery *v.* People, 76 Ill. 217.

The fact that a father had given a slave to several of his daughters at their respective marriages is relevant to the question whether the delivery of another slave to another daughter at the time of her marriage was a gift. Smith *v.* Montgomery, 5 Monroe (Ky.), 502.

Two women living in adjoining tenements fell into an altercation, during which one was severely injured. The other, on being prosecuted for an assault, set up that the injury was unintentional and accidental. That the prisoner did not visit, inquire for, or in any way interest herself in the injured party, is evidence that the assault was intentional. State *v.* Alford, 31 Conn. 40.

Proof that A was in the habit of loaning money without taking notes, is relevant, in a suit to recover $500 so loaned for six months, to rebut any unfavorable presumption from the singularity of such a transaction. Stolp *v.* Blair, 68 Ill. 541.

A sues B for negligently towing a scow, whereby the scow was partially swamped, and several cattle belonging to A were lost. The defendant may ask the owner of the scow, who has testified that she was seaworthy, on cross-examination, how many times she has been accidentally sunk before. Baird *v.* Daly, Ct. of App. N. Y., 3 L. & Eq. Reptr. 573.

On a question of negligence, the employment of more men to watch the track after a fire has been caused by sparks escaping from a locomotive is relevant as an admission that enough had not previously been employed. Westfall *v.* Erie R. R. Co., 5 Hun (N. Y. S. C.), 75.

On an indictment for seduction, the fact that others "kept company" with the prosecutrix as well as the defendant, is relevant. Steinhouse *v.* State, 47 Ind. 17.

On the question whether A committed adultery, the fact that he associated with prostitutes is relevant. Ciocci *v.* Ciocci, 29 L. J. Pr. & Mat. 60.

The fact that the complainant in a bastardy case associated with young men of notoriously bad character for chastity, is not relevant to the question whether the defendant is the father of the child. Eddy *v.* Gray, 4 Allen (Mass.), 435.

The fact that A habitually loans money at usurious interest is not

relevant to the question whether there was usury in the particular loan on trial. Jackson *v.* Smith, 7 Cow. (N. Y.) 717.

The fact that A had drawn four other notes in a given form is not relevant to the question whether he drew the notes in controversy in that way. Iron Mt. Bank *v.* Murdock, 62 Mo. 70.

The question being whether the plaintiff's intestate was injured by the negligence of the defendant, an offer by the defendant to pay the intestate's funeral expenses is irrelevant. Campbell, Admr., *v.* Chicago, Rock Island, & Pac. R. R. Co., Sup. Ct. Iowa, 1876, 3 L. & Eq. Reptr.

In an action against a physician for malpractice, the fact that he has never called for his pay for his services is irrelevant. Baird *v.* Gillett, 47 N. Y. 186.

On the question of damages in a slander suit, the moral and intellectual character of the person to whom the slander is addressed, if the words are understood, are irrelevant. Sheffill *v.* Van Deusen, 15 Gray (Mass.), 485.

On a question of a breach of contract, the position and standing of the parties in society are irrelevant. Rowland *v.* Dowe, 2 Murphy (N. C.), 347.

The question being whether A committed suicide, the fact that he was an infidel or an atheist is irrelevant. Gibson *v.* American Mut. Life Ins. Co., 37 N. Y. 580.

On a trial for homicide, the question being which party began the encounter, threats previously made by either against the other, but unknown to the other, are relevant. Wiggins *v.* United States, Sup. Ct. U. S., Ch. L. News, June 2, 1877; Stokes *v.* People, 53 N. Y. 174; Campbell *v.* People, 16 Ill. 18; Keenan *v.* State, 18 Ga. 194; Holler *v.* State, 37 Ind. 57; People *v.* Scroggins, 37 Cal. 676; Wharton on Homicide, §§ 694, 695. This is now the very generally accepted doctrine. That it has been frequently held to the contrary, see the cases cited by Wharton, *ut supra*. In Horbuck *v.* State, 43 Texas, 242, the habit of the deceased of carrying weapons, and his character for violence, are held relevant under such circumstances, if known to the defendant, on the question whether the defendant had such grounds of apprehension as to call upon him to take steps in his defence. S. C. 2 Cen. L. J. 414. See also Wharton on Homicide, § 606 *et seq.*

On the general question of relevancy, see the recent very elaborate and valuable opinion of Doe, J., in Darling *v.* Westmoreland, 52 N. H. 401; Att'y-Genl. *v.* Hitchcock, 1 Ex. 91; Reg. *v.* Burke, 8 Cox, 44; Southern Law Rev. vol. iii. N. S. pp. 93–118. See also articles 3 and 10, *post*, and notes.

The general rule is, that the introduction by one party of irrelevant evidence does not give the right to reply. Shedden *v.* Patrick,

2 Sw. & Tr. 170; Mitchell *v.* Sellman, 5 Md. 376. But, in New Hampshire, the right to reply seems to be conceded, Forbush *v.* Goodwin, 5 Fost. 425; and in Massachusetts it is said to be a matter within the discretion of the judge, Brooks *v.* Acton, 117 Mass. 204; see further upon this point, Cowen & Hill's Notes to Phillip's Ev. vol. ii. p. 430, note 328.}

{A fact in issue in a criminal case must be proved beyond a reasonable doubt.

A is indicted for assaulting B. The assault must be proved beyond a reasonable doubt.

A fact in issue in a civil case may be proved by a preponderance of evidence in favor of the fact in issue.

B sues A for an assault upon him. The assault may be proved by a preponderance of evidence.

Subject to this important distinction, the rules in civil and criminal cases are the same. As to the origin and history of the distinction, see 10 Am. Law Rev. pp. 642–664.}

CHAPTER II.

OF FACTS IN ISSUE AND RELEVANT TO THE ISSUE.

ARTICLE 2.*

FACTS IN ISSUE AND FACTS RELEVANT TO THE ISSUE MAY BE PROVED.

EVIDENCE may be given in any proceeding of any fact in issue,

and of any fact relevant to any fact in issue unless it is hereinafter declared to be deemed to be irrelevant,

and of any fact hereinafter declared to be deemed to be relevant to the issue whether it is or is not relevant thereto.

Provided that the judge may exclude evidence of facts which, though relevant or deemed to be relevant to the issue, appear to him too remote to be material under all the circumstances of the case.

{See Morrissey *v.* Ingham, 111 Mass. 63, for several good illustrations of this proviso.

Facts and circumstances in their nature continuous may always be shown to exist anterior to the precise period in question, unless so remote as to afford no reasonable inference that there has been no change. Com. *v.* Billings, 97 Mass. 406.

The possession of stolen property may be of such property, and so long after the theft as to justify the judge in rejecting the fact, as, though relevant, of inappreciable weight. Sloan *v.* People, 47 Ill. 76; Jones *v.* State, 26 Miss. 247; Reg. *v.* Crittenden, 6 Jur. 267. Or the judge may leave the question to the jury, whether, upon all the facts, the possession affords any presumption connecting the

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* See Appendix, Note II.

prisoner with the crime. State *v.* Hodges, 50 N. H. 510; State *v.* Brewster, 7 Vt. 122; Rex *v.* Cokin, 2 Lew. C. C. 235, Coleridge, J. See *post*, art. 11, par. 2.

So, on a question of the value of land, recent sales of similar land in the vicinity are relevant. But what constitutes recentness, similarity, and vicinity is to a great extent to be left to the discretion of the judge, and much weight is to be given to his opinion. Benham *v.* Dunbar, 103 Mass. 365. Nevertheless, whether that discretion is soundly exercised, may, upon report of the facts, on exceptions, be reviewed by the appellate court. Chandler *v.* Jamaica Pond Aqueduct Corp., Sup. Ct. Mass., 3 L. & Eq. Reptr. 459.

So, when mental condition at a given time is the issue, evidence of the condition, both prior and subsequent to that time, is relevant; but how long before or after is in the discretion of the judge, subject to a like revision. White *v.* Graves, 107 Mass. 325.

So prior and subsequent acts of adultery are proof of an adulterous disposition. Thayer *v.* Thayer, 101 Mass. 111; Boddy *v.* Boddy, 30 L. J. Pr. & Mat. 23.

Although, when a relevant fact has greater or less weight in proportion to its remoteness in point of time, place, or other circumstance, it is sometimes held that the judge may, in his discretion, fix the limit beyond which it becomes of inappreciable weight, and reject it as immaterial, though relevant, it is a practice liable to abuse, and, as there is no rule by which the limit is to be fixed, certain to be inconsistently applied by different judges. The safer and more satisfactory rule is for the judge to admit whatever is relevant, and leave the question of its weight to the jury, — the rule adopted in some courts, as we have just seen. And so far as the judge deals with the question of its weight, he interferes with the just prerogative of the jury. "Whether there be any evidence," said Mr. Justice Buller, long ago, in the Company of Carpenters, &c. of Shrewsbury *v.* Hayward, Doug. 375, "is a question for the judge; whether *sufficient* evidence, is for the jury." Chandler *v.* Roeder, 24 How. (U. S.) 224. This exercise of discretion is defended on the ground that the time of the courts ought not to be consumed in the taking of substantially immaterial evidence. But it will take much less time to hear the evidence, if relevant, without regard to its weight, than to decide, on exceptions, the question whether the evidence was admissible or inadmissible, on account of its degree of relevancy. Besides, it is hardly probable that respectable counsel will waste their own and their client's time and money, and vex the court and jury, with much evidence which is so remotely relevant as to be practically immaterial. If counsel are right in the production of relevant evidence, they ought not to be deprived of it because

they may have misjudged as to its weight. In the first instance, the jury only have the right to say they have misjudged. Relevancy should be the simple and only test, where the statute does not control; and the exclusion of relevant evidence, offered in good faith, is as indefensible upon principle as would be the exclusion of a competent witness, — an accomplice, or one who had deliberately sworn falsely in a material matter, for instance, — on the ground that his evidence was without weight. 1 Greenl. Ev. § 49, and note; Holt *v.* Crume, Lit. Sel. Cas. (Ky.) 500.

It is discretionary with the judge whether to admit evidence which does not yet appear to be relevant, on the assurance of counsel that other facts will be proved which will show its relevancy, the general practice being to admit on such assurance, and afterwards exclude it, if its relevancy is not made to appear. Moppin *v.* Ætna Axle, &c. Co., 41 Conn. 34; Haigh *v.* Belcher, 7 C. & P. 339; Abney *v.* Kingsland, 10 Ala. 355; Com. *v.* Davis, 107 Mass. 210; Harris *v.* Holmes, 30 Vt. 352; McAllister's Case, 11 Shep. (Me.) 139; U. S. *v.* Flowery, 1 Sprague, Dec. 109; Van Buren *v.* Wells, 19 Wend. (N. Y.) 203.

And no exception lies to the exercise of such discretion by the judge, as to the order in which the evidence is admitted. But such evidence may be rejected, till its relevancy appears. Weidler *v.* Farmers' Bank, 11 Serg. & Rawle (Pa.), 134.}

Illustration.

(*a*) A is indicted for the murder of B, and pleads not guilty.

The following facts may be in issue: — The fact that A killed B; the fact that at the time when A killed B he was prevented by disease from knowing right from wrong; the fact that A had received from B such provocation as would reduce his offence to manslaughter.

The fact that A was at a distant place at the time of the murder would be relevant to the issue; the fact that A had a good character would be deemed to be relevant; the fact that C on his deathbed declared that C and not A murdered B would be deemed not to be relevant.

ARTICLE 3.

RELEVANCY OF FACTS FORMING PART OF THE SAME TRANSACTION AS FACTS IN ISSUE.

Facts which, though not in issue, are so connected with a fact in issue as to form part of the same transaction or

subject-matter, are deemed to be relevant to the fact with which they are so connected.

Illustrations.

(*a*) The question is, whether A murdered B by shooting him.

The fact that a witness in the room with B, just before he was shot, saw a man with a gun in his hand pass a window opening into the room in which B was shot, and thereupon exclaimed, "That's the butcher!" (a name by which A was known) is deemed to be relevant.[1]

(*b*) The question is, whether A committed manslaughter on B by carelessly driving over him.

A statement made by B as to the cause of the accident, as soon as he was picked up, is deemed to be relevant, though it may not be a dying declaration within article 26.[2]

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[1] R. *v.* Foulkes, per Campbell, C. J., Leicester Spring Assizes, 1856. Ex relatione O'Brien, Serjt. {The question being whether the plaintiff's intestate died by his own hand, evidence that about the time of his death the occupant of the adjoining room came out, "seemingly excited, and saying something about the man having shot himself," is relevant. Newton *v.* Mut. Ben. Life Ins. Co., 2 Dill. (U. S. C. Ct.) 154; Galena, &c. R. R. Co. *v.* Fay, 16 Ill. 558.}

[2] R. *v.* Foster, 6 C. & P. 325. The judges (Park, J., Gurney, B., and Patteson, J.) who decided this case referred to Aveson *v.* Lord Kinnaird, 6 Ea. 193. See Article 11, Illustration (*m*). {Incidental declarations, acts, and circumstances contemporaneous with the principal acts, or so nearly contemporaneous with them as to constitute a part thereof, and in some respect to qualify them, become relevant, whenever the principal acts themselves are relevant. Boyden *v.* Burke, 14 How. (U. S.) 575; Swift *v.* Mass. Mut. Life Ins. Co., 63 N. Y. 186; Boston & Wor. R. R. Co. *v.* Dana, 1 Gray, (Mass.) 83; 1 Greenl. Ev. § 108; Nelson *v.* State, 2 Swan (Tenn.), 237; Garber *v.* State, 4 Cold. (Tenn.) 161; People *v.* Vernon, 35 Cal. 49; Carter *v.* Buchanan, 3 Ga. 513; Kearney *v.* Farrell, 28 Conn. 317. But not if the principal facts are irrelevant, Carleton *v.* Patterson, 29 N. H. 580; Fail *v.* McArthur, 31 Ala. 26; or are unequivocal, and need no explanation, Nutting *v.* Page, 4 Gray (Mass.), 584; or are inconsistent with the declaration, State *v.* Shelledy, 8 Clarke (Iowa), 477.

If the declaration be so connected with or so grows out of the act as fairly to be considered incidental to or qualifying it, it is

(*c*) The question is, whether A, the owner of one side of a river, owns the entire bed of it, or only half the bed, at a particular spot. The fact that he owns the entire bed a little lower down the river is deemed to be relevant.[1]

(*d*) The question is, whether a slip of land by the roadside belongs to the lord of the manor or to the owner of the adjacent land. The fact that the lord of the manor owned other parts of the slip of land by the side of the same road is deemed to be relevant.[2]

{Such evidence as is admissible under the last two illustrations is so only as to proof of ownership of lands by acts of possession; and the latitude allowed springs, it is said, from the impossibility of proving the exact spot of a trespass. Hence evidence of acts done in other places may be admitted, provided there is a common character of locality between the place and the spot in question as to give

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relevant, though not contemporaneous; as where a patient tells his physician how the injury happened, Harriman *v.* Stowe, 57 Mo. 93; or one just escaping from an assault tells who was the aggressor, Carr *v.* McPike, 3 Cush. (Mass.) 181; Jordan's Case, 25 Gratt. (Va.) 443; 1 Greenl. Ev. § 110.

Courts are inclined to extend rather than restrict the scope of the rule admitting declarations as part of and qualifying an act. Insurance Co. *v.* Moody, 8 Wall. (U. S.) 397.

On a trial for homicide, a statement made by the prisoner a few minutes after, and in the hearing and presence of those who saw the homicide, may be relevant in his favor, and it is error to exclude it. Little's Case, 25 Gratt. (Va.) 921; Hart *v.* Powell, 18 Ga. 635; 1 Greenl. Ev. § 108, and notes.

It being material to show that A went to a certain place, the fact that he went away declaring that he was going to that place is relevant. State *v.* Howard, 32 Vt. 380; Richmond *v.* Thomaston, 38 Me. 232; New Milford *v.* Sherman, 21 Conn. 101. So also is a letter, written while away, explanatory of the nature of the writer's absence. Rawson *v.* Haigh, 2 Bing. 99.

A wife leaves her husband, and goes to her father's house. The reasons she gives for leaving her husband on the day of her return are relevant; the reasons she gives the day after are irrelevant. Johnson *v.* Sherwin, 3 Gray (Mass.) 374.

On a question of domicile, declarations of intent are relevant. The Venus, 8 Cranch (U. S.), 278; Thorndike *v.* Boston, 1 Met. (Mass.) 242; Richmond *v.* Vassalborough, 5 Greenl. (Me.) 396.}

[1] Jones *v.* Williams, 2 M. & W. 326.

[2] Doe *v.* Kemp, 7 Bing. 332; 2 Bing. N. C. 102.

rise to the inference that the owner of the former is also owner of the latter. 1 Greenl. Ev § 53. Whether that common character exists is a preliminary question for the determination of the judge, Doe *v.* Kemp, 7 Bing. 336; and there seems to be no test of the correctness of this determination, unless, possibly, under exceptions, when the judgment of one or more superior judges may sustain or overrule the judgment of an inferior one. The principle upon which such evidence is admissible can only be understood by a careful study of the cases themselves, and perhaps not then. What "common character of locality" existed in either case except contiguity is not apparent. It will hardly do for a man to claim title to a lot of land because it is contiguous to another lot which he does own. These cases seem to have been recognized in Simpson *v.* Dendy, 8 C. B. N. S. 433, where there was not even contiguity to support the "common character;" but no case has been found in this country sanctioning such latitude.}

ARTICLE 4.*

ACTS OF CONSPIRATORS.

When two or more persons conspire together to commit any offence or actionable wrong, every thing said, done, or written by any one of them in the execution or furtherance of their common purpose, is deemed to be so said, done, or written by every one, and is deemed to be a relevant fact as against each of them;[1] but statements as to measures taken in the execution or furtherance of any such common purpose are not deemed to be relevant as such as against any conspirators, except those by whom or in whose presence such statements are made. Evidence of acts or statements deemed to be relevant under this article may not be given until the judge is satisfied that, apart from them, there are *primâ facie* grounds for believing in the existence of the conspiracy to which they relate.[2]

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* See Appendix, Note III.

[1] {Am. Fur Co. *v.* United States, 2 Pet. (U. S.) 358; Williams *v.* State, 47 Ind. 568.}

[2] {The judge's decision on this point may be revised on exceptions

Illustrations.

(*a*) The question is, whether A and B conspired together to cause certain imported goods to be passed through the custom-house on payment of too small an amount of duty.

The fact that A made in a book a false entry, necessary to be made in that book in order to carry out the fraud, is deemed to be a relevant fact as against B.

The fact that A made an entry on the counterfoil of his cheque-book showing that he had shared the proceeds of the fraud with B, is deemed not to be a relevant fact as against B.[1]

(*b*) The question is, whether A committed high treason by imagining the king's death; the overt act charged is that he presided over an organized political agitation calculated to produce a rebellion, and directed by a central committee through local committees.

The facts that meetings were held, speeches delivered, and papers circulated in different parts of the country, in a manner likely to produce rebellion by and by the direction of persons shown to have acted in concert with A, are deemed to be relevant facts as against A, though he was not present at those transactions, and took no part in them personally.

An account given by one of the conspirators in a letter to a friend, of his own proceedings in the matter, not intended to further the common object, and not brought to A's notice, is deemed not to be relevant as against A.[2]

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containing all the facts upon which he based his decision. Burke *v.* Miller, 7 Cush. (Mass.) 547.}

[1] R. *v.* Blake, 6 Q. B. 137–140. {The correctness of the law stated in this branch of this illustration will appear more clearly when it is stated that B is a land-waiter, and A is an importer's agent, at the custom-house, whose respective duties were independently to make entries of the contents of cases imported, each as a check upon the other. It was shown that each had made false entries as to the contents of thirteen different packages. It was then proposed to offer entries made by A in his book of the amount of duty paid by him on the several cases as evidence against B.}

[2] R. *v.* Hardy, 24 S. T. *passim*, but see particularly 451–453. {Declarations made after the execution of the conspiracy are only good against those who make them, or have notice of them. Clinton *v.* Estes, 20 N. Y. 216; State *v.* Ross, 29 Mo. 32; 1 Greenl. Ev. § 111. Flight of one conspirator is no evidence of the guilt of another. People *v.* Stanley, 47 Cal. 113.}

ARTICLE 5.*

TITLE.

When the existence of any right of property, or of any right over property is in question, every fact which constitutes the title of the person claiming the right, or which shows that he, or any person through whom he claims, was in possession of the property, and every fact which constitutes an exercise of the right, or which shows that its exercise was disputed, or which is inconsistent with its existence or renders its existence improbable, is deemed to be relevant.

Illustrations.

(*a*) The question is, whether A has a right of fishery in a river.

An ancient *inquisitio post mortem* finding the existence of a right of fishery in A's ancestors, licenses to fish granted by his ancestors, and the fact that the licensees fished under them, are deemed to be relevant.[1]

(*b*) The question is, whether A owns land.

The fact that A's ancestors granted leases of it is deemed to be relevant.[2]

(*c*) The question is, whether there is a public right of way over A's land.

The facts that persons were in the habit of using the way, that they were turned back, that the road was stopped up, that the road was repaired at the public expense, and A's title-deeds showing that for a length of time, reaching beyond the time when the road was said to have been used, no one had power to dedicate it to the public, are all deemed to be relevant.[3]

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* See Appendix, Note IV.

[1] Rogers *v.* Allen, 1 Camp. 309.

[2] Doe *v.* Pulman, 3 Q. B. 622, 623, 626 (citing Duke of Bedford *v.* Lopes). The document produced to show the lease was a counterpart signed by the lessee. See *post*, art. 64.

[3] Common practice. As to the title-deeds, Brough *v.* Lord Scarsdale, Derby Summer Assizes, 1865. {Declarations accompanying and qualifying possession, whether of real or personal property, or whether in disparagement of title or otherwise, are facts within the meaning of this article. 1 Greenl. Ev. § 109; Turner *v.* Baldwin, Sup. Ct. Conn., 1876, 4 L. & Eq. Reptr. 7.}

ARTICLE 6.

CUSTOMS.

When the existence of any custom is in question, every fact is deemed to be relevant which shows how, in particular instances, the custom was understood and acted upon by the parties then interested.

Illustrations.

(*a*) The question is, whether, by the custom of borough-English as prevailing in the manor of C, A is heir to B.

The fact that other persons, being tenants of the manor, inherited from ancestors standing in the same or similar relations to them as that in which A stood to B, is deemed to be relevant.[1]

ARTICLE 7.

MOTIVE, PREPARATION, SUBSEQUENT CONDUCT, EXPLANATORY STATEMENTS.

When there is a question whether any act was done by any person, the following facts are deemed to be relevant, that is to say —

any fact which supplies a motive for such an act, or which constitutes preparation for it.[2]

any subsequent conduct of such person apparently influenced by the doing of the act, and any act done in consequence of it by or by the authority of that person.[3]

Illustrations.

(*a*) The question is, whether A murdered B.

The facts that, at the instigation of A, B murdered C twenty-five years before B's murder, and that A at or before that time used expressions showing malice against C, are deemed to be relevant as showing a motive on A's part to murder B.[4]

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[1] Muggleton *v.* Barnett, 1 H. & N. 282. For a late case of evidence of a custom of trade, see *Ex parte* Powell, *in re* Matthews, L. R. 1 Ch. D. 501.

[2] Illustrations (*a*) and (*b*).

[3] Illustrations (*c*), (*d*), and (*e*).

[4] R. *v.* Clewes, 4 C. & P. 221.

{The question is, whether A burned a certain building.

The fact that A had excessive insurance upon the building is relevant, as showing that A had a motive to destroy it. State *v.* Cohn, 9 Nev. 179; Com. *v.* McCarthy, 119 Mass. 354.}

(*b*) The question is, whether A committed a crime.

The fact that A procured the instruments with which the crime was committed is deemed to be relevant.[1]

(*c*) A is accused of a crime.

The facts that, either before, or at the time of, or after the alleged crime, A caused circumstances to exist tending to give to the facts of the case an appearance favorable to himself, or that he destroyed or concealed things or papers, or prevented the presence or procured the absence of persons who might have been witnesses, or suborned persons to give false evidence, are deemed to be relevant.[2]

(*d*) The question is, whether A committed a crime.

The facts that, after the commission of the alleged crime, he absconded, {or concealed himself,} or was in possession of property or the proceeds of property acquired by the crime, or attempted to conceal things which were or might have been used in committing it, and the manner in which he conducted himself when statements on the subject were made in his presence and hearing, are deemed to be relevant.[3]

(*e*) The question is, whether A suffered damage in a railway accident.

The fact that A conspired with B, C, and D to suborn false witnesses in support of his case is deemed to be relevant,[4] as conduct subsequent to a fact in issue tending to show that it had not happened.

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[1] R. *v.* Palmer (*passim*); {Com. *v.* Roach, 108 Mass. 289.}

[2] R. *v.* Patch, Wills, Circ. Ev. 230; R. *v.* Palmer, *ub. sup.* (*passim*). {And so any thing said or done by either party to the issue, intended to produce a false impression touching the fact in issue, or his or his adversary's connection with it, is relevant. As when the *status* of things at the *locus* of the crime is charged just before a view by the jury, State *v.* Knapp, 45 N. H. 148; or a false reason is given for an act, State *v.* Reed, 62 Me. 129; or evidence is fabricated, Winchell *v.* Edwards, 57 Ill. 41; Com. *v.* Webster, 5 Cush. (Mass.) 316; State *v.* Williams, 27 Vt. 226; 1 Greenl. Ev. § 37.}

[3] Common practice. {Com. *v.* Tolliver, 119 Mass. 312.}

[4] Moriarty *v.* London, Chatham, & Dover Ry. Co., L. R. 5 Q. B. 314; compare Gery *v.* Redman, L. R. 1 Q. B. D. 161. {The issue being whether A owes B, the fact that A suborned C to testify falsely

ARTICLE 8.*

STATEMENTS ACCOMPANYING ACTS, COMPLAINTS, STATEMENTS IN PRESENCE OF A PERSON.

Whenever any act may be proved, statements accompanying and explaining that act made by or to the person doing it may be proved if they are necessary to understand it.[1]

In criminal cases the conduct of the person against whom the offence is said to have been committed, and in particular the fact that he made a complaint soon after the offence to persons to whom he would naturally complain, are deemed to be relevant; but the terms of the complaint itself seem to be deemed to be irrelevant.[2]

When a person's conduct is in issue or is or is deemed to be relevant to the issue, statements made in his presence and hearing by which his conduct is likely to have been affected, are deemed to be relevant facts.[3]

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* See Appendix, Note V.

in support of his claim is relevant, as an admission by conduct that the claim is unjust. Egan *v.* Bowker, 5 Allen (Mass.), 449. But the fact that he suborned a witness in another case, or that he committed forgery in a matter not connected with the transaction or trust, is not relevant. Com. *v.* Mason, 105 Mass. 163. On an issue of forgery, the procurement of a false and fictitious deposition — the respondent personating the deponent — is relevant, as tending to show guilt. State *v.* Williams, 27 Vt. 226.}

[1] Illustrations (*a*) and (*b*). Other statements made by such persons are relevant or not according to the rules as to statements hereinafter contained. See Ch. IV. *post.*

[2] Illustration (*c*).

[3] R. *v.* Edmunds, 6 C. & P. 164; Neil *v.* Jakle, 2 C. & K. 709. {This proposition should be limited to such statements as are within the presumed knowledge of the party, and call for notice on his part, and at a time and under circumstances when notice would be proper. Thus, he is not bound to reply to statements made in his presence during a trial, Broyles *v.* State, 47 Ind. 251; or where he has for a proper purpose promised to keep silent, Slattery *v.* People, 76 Ill.

Illustrations.

(*a*) The question is, whether A committed an act of bankruptcy, by departing the realm with intent to defraud his creditors.

Letters written during his absence from the realm, indicating such an intention, are deemed to be relevant facts.[1]

(*b*) The question is, whether A was sane.

The fact that he acted upon a letter received by him is part of the facts in issue. The contents of the letter so acted upon are deemed to be relevant, as statements accompanying and explaining such conduct.[2]

(*c*) The question is, whether A was ravished.

The fact that, shortly after the alleged rape, she made a complaint relating to the crime, and the circumstances under which it was made, are deemed to be relevant, but not (it seems) the terms of the complaint itself.[3] {1 Greenl. Ev. § 102. The terms of the complaint are admissible on cross-examination, and in corroboration of the witness, if she is impeached. 3 Greenl. Ev. § 213. In some courts this complaint is held admissible only in a case of rape. Haynes *v.* Com., Sup. Ct. Va., 1877, 3 L. & Eq. Reptr. 699; People *v.* McRea, 32 Cal. 98. But see *ante*, art. 3, note to Illustration (*b*).}

The fact that, without making a complaint, she said that she had been ravished, is not deemed to be relevant as conduct under this article, though it might be deemed to be relevant (*e.g.*) as a dying declaration under article 26.

ARTICLE 9.

FACTS NECESSARY TO EXPLAIN OR INTRODUCE RELEVANT FACTS.

Facts necessary to be known to explain or introduce a fact in issue or relevant or deemed to be relevant to the

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217. Nor does silence, when a party is under arrest, give rise to any presumption for or against the party. Com. *v.* Walker, 13 Allen (Mass.), 570; Bob *v.* State, 32 Ala. 560; Noonan *v.* State, 9 Miss. 562. Kelley *v.* People, 55 N. Y. 565, *contra*, seems to have proceeded upon a misapprehension of the case upon which it relied. See 1 Greenl. Ev. (13th ed.) § 199.}

[1] Rawson *v.* Haigh, 2 Bing. 99; Bateman *v.* Bailey, 5 T. R. 512. {See *ante*, art. 3.}

[2] Wright *v.* Doe d. Tatham, 7 A. & E. 324, 325 (per Denman, C. J.).

[3] R. *v.* Walker, 2 M. & R. 212. See Appendix, Note V.

issue, or which support or rebut an inference suggested by any such fact, or which establish[1] the identity of any thing or person whose identity is in issue or is or is deemed to be relevant to the issue, or which fix the time or place at which any such fact happened, or which show that any document produced is genuine or otherwise, or which show the relation of the parties by whom any such fact was transacted, or which afforded an opportunity for its occurrence or transaction, or which are necessary to be known in order to show the relevancy of other facts, are deemed to be relevant in so far as they are necessary for those purposes respectively.

{So are facts which show that a witness is incredible or biased. *Post*, art. 120.}

Illustrations.

(*a*) The question is, whether a writing published by A of B is libellous or not.

The position and relations of the parties at the time when the libel was published may be deemed to be relevant facts introductory to the facts in issue.

The particulars of a dispute between A and B about a matter unconnected with the alleged libel are not deemed to be relevant under this article, though the fact that there was a dispute may be deemed to be relevant if it affected the relations between A and B.[2]

(*b*) The question is, whether A wrote an anonymous letter, threatening B, and requiring B to meet the writer at a certain time and place to satisfy his demands.

The fact that A met B at that time and place is deemed to be relevant, as conduct subsequent to and affected by a fact in issue.

The fact that A had a reason, unconnected with the letter, for being at that time at that place, is deemed to be relevant, as rebutting the inference suggested by his presence.[3]

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[1] {Or tend to establish or disprove.}

[2] Common practice. {When a party puts facts in evidence for the purpose of discrediting a witness, explanations of the facts so put in are relevant. To what extent of detail is within the discretion of the judge. Com. *v.* Jennings, 107 Mass. 488.}

[3] R. *v.* Barnard, 19 St. Tri. 815, &c. {The question is, whether A committed a trespass. The fact that he was at the place where

(*c*) A is tried for a riot, and is proved to have marched at the head of a mob. The cries of the mob are deemed to be relevant, as explanatory of the nature of the transaction.[1]

(*d*) The question is, whether a deed was forged. It purports to be made in the reign of Philip and Mary, and enumerates King Philip's titles.

The fact that at the alleged date of the deed, Acts of State and other records were drawn with a different set of titles, is deemed to be relevant.[2]

(*e*) The question is, whether A poisoned B. Habits of B known to A, which would afford A an opportunity to administer the poison, are deemed to be relevant facts.[3]

(*f*) The question is, whether A made a will under undue influence. His way of life and relations with the persons said to have influenced him unduly, are deemed to be relevant facts.[4]

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the trespass was committed, at the time it was committed, is relevant. So is the fact that he was there for another purpose relevant, in rebuttal. Prindle *v.* Glover, 4 Conn. 266.}

[1] R. *v.* Lord George Gordon, 21 St. Tri. 520. {The exclamations and conduct of the passengers on board a railroad train at the time of an accident are relevant to explain and justify the conduct of the injured plaintiff, though not in his presence. Galena R. R. Co. *v.* Fay, 16 Ill. 558. But the conversation of men just emerged from an alleged house of ill-fame, not in the presence of the alleged keeper, are not relevant in explanation of the character of the house. Com. *v.* Harwood, 4 Gray (Mass.), 41. This last case, however, savors of strictness. See *ante*, art. 3, notes; 1 Greenl. (13th ed.) § 108, n.}

[2] Lady Ivy's Case, 10 St. Tri. 615.

[3] R. *v.* Donellan, Wills, Circ. Ev. 192; and see my "General View of the Criminal Law," p. 338, &c.

[4] Boyse *v.* Rossborough, 6 H. L. C. 42–58.

CHAPTER III.

OCCURRENCES SIMILAR TO BUT UNCONNECTED WITH THE FACTS IN ISSUE, IRRELEVANT EXCEPT IN CERTAIN CASES.

ARTICLE 10.*

SIMILAR BUT UNCONNECTED FACTS.

A FACT which renders the existence or non-existence of any fact in issue probable by reason of its general resemblance thereto and not by reason of its being connected therewith in any of the ways specified in articles 3–10, both inclusive, is deemed not to be relevant to such fact except in the cases specially excepted in this chapter.

Illustrations.

(*a*) The question is, whether A committed a crime.

The fact that he formerly committed another crime of the same sort, and had a tendency to commit such crimes, is irrelevant.[1]

(*b*) The question is, whether A, a brewer, sold good beer to B, a publican. The fact that A sold good beer to C, D, and E, other publicans, is irrelevant [2] (unless it is shown that the beer sold to all is of the same brewing).[3]

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* See Appendix, Note VI.

[1] R. *v.* Cole. 1 Phi. Ev. 508 (said to have been decided by all the Judges in Mich. Term, 1810).

[2] Holcombe *v.* Hewson, 2 Camp. 391.

[3] See Illustrations to article 3. {See also *ante*, notes to articles 1 and 3. The difficulties in the application of the rule stated in the article may be further illustrated by reference to the following cases.

The question being whether a certain fire was caused by sparks escaping from a certain locomotive, the fact that at various times before the fire, and during the same summer, other fires were caused

ARTICLE 11.*

ACTS SHOWING INTENTION, GOOD FAITH, ETC.

When there is a question whether a person said or did something, the fact that he said or did something of the same sort on a different occasion may be proved if it

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* See Appendix, Note VI.

along the line of the same railroad by sparks escaping from other locomotives of the same company is relevant. Grand Tr. R. R. Co. *v.* Richardson, 91 U. S. 454; Penn. R. R. Co. *v.* Stranahan, 79 Pa. St. 405; Annapolis R. R. Co. *v.* Gantt, 39 Md. 115; Field *v.* N. Y. Central R. R. Co., 32 N. Y. 339; Longabaugh *v.* Virginia, &c. R. R. Co., 9 Nev. 271; Boyce *v.* Cheshire R. R. Co., 43 N. H. 627; Cleaveland *v.* Gr. Tr. R. R. Co., 42 Vt. 449; *contra*, Coale *v.* H. & St. J. R. R. Co., 60 Mo. 224. The other cases to the contrary, B. & S. R. R. *v.* Woodruff, 4 Md. 254, Boyce *v.* Cheshire R. R., 42 N. H. 97, cannot be regarded as law, even in those States. 2 Cen. L. J. 642.

The question being whether a horse was frightened by a certain pile of lumber, evidence that other horses were frightened by the same pile is relevant. Darling *v.* Westmoreland, 52 N. H. 401. In Collins *v.* Dorchester, 6 Cush. (Mass.) 396, in an action to recover for injuries caused by a defect in the highway, it was held that proof of similar injuries before received by others at or near the same place, was irrelevant to the question whether the road was defective or not. See also Hawks *v.* Charlemont, 110 Mass. 110, to the same point.

A sues B for negligently permitting a car to run off the track, to A's injury. Proof that the cars of the same line have several times run off the same track is relevant. Mobile R. R. *v.* Ashcroft, 48 Ala. 15.

The question being whether a certain driver of a horse-car was negligent at a certain time, the fact that he had been guilty of the same negligence at other times is not relevant. Maguire *v.* Middlesex R. R. Co., 115 Mass. 240. Nor is the fact that he is generally careful relevant to the issue whether he was then careful. McDonald *v.* Savoy, 110 Mass. 49; Morris *v.* Eastham, 41 Conn. 252.

A hog was shot twice within an hour of the same day. The fact that B shot him the second time is relevant to the charge that he fired the first shot. Landell *v.* Hotchkiss, 1 Th. & C. N. Y. Sup. Ct. 580.

Three burglaries were committed in one night in the same neighborhood, property taken from one house being found in another.

shows[1] the existence on the occasion in question of any intention, knowledge, good or bad faith, malice, or other state of mind, or of any state of body or bodily feeling, the existence of which is in issue or is or is deemed to be relevant to the issue; but such acts or words may not be proved merely in order to show that the person so acting or speaking was likely on the occasion in question to act in a similar manner.

[2] Where proceedings are taken against any person for having received goods, knowing them to be stolen, or for having in his possession stolen property, the fact that there was found in the possession of such person other property stolen within the preceding period of twelve months, is deemed to be relevant to the question whether he knew the property to be stolen which forms the subject of the proceeding taken against him.

If, in the case of such proceedings as aforesaid, evidence has been given that the stolen property has been found in the possession of the person proceeded against, the fact that such person has within five years immediately preceding been convicted of any offence involving fraud or dishonesty, is deemed to be relevant for the

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The fact that A committed one is relevant to the question whether he committed the other. Taylor, Ev. § 307; Rex *v.* Wylie, 1 N. R. 94; Rex *v.* Ellis, 6 B. & C. 76; Rex *v.* Long, 6 C. & P. 179; Heath *v.* Com., 1 Rob. (Va.) 235; State *v.* Wentworth, 37 N. H. 196. See also 1 Greenl. Ev. (13th ed.) § 53, n.}

[1] {Such a fact is relevant, *because* it tends to show knowledge, intent, &c. This is the ground upon which the case admitting such testimony proceeds. See the cases cited in the notes to Illustrations (*a*), (*b*), and (*c*).}

[2] 34 & 35 Vict. c. 112, s. 19 (language slightly modified). This enactment overrules R. *v.* Oddy, 2 Den. C. C. 264, and practically supersedes R. *v.* Dunn, 1 Moo. C. C. 150, and R. *v.* Davis, 6 C & P. 177. See Illustrations. {It is in accordance, however, with the common law as held in this country, except that the limitation as to time is left to the discretion of the court.}

purpose of proving that the person accused knew the property which was proved to be in his possession to have been stolen, and may be proved at any stage of the proceedings: provided that not less than seven days' notice in writing has been given to the person accused that proof is intended to be given of such previous conviction.

{This provision is new, and, so far as we have observed, peculiar to the English statute. It is significant as indicating a tendency to abandon the absurdity that good character is relevant to show that a man has not committed an offence, but bad character is not relevant to show that he has.}

Illustrations.

(*a*) A is charged with receiving two pieces of silk from B, knowing them to have been stolen by him from C.

The facts that A received from B many other articles stolen by him from C in the course of several months, and that A pledged all of them, are deemed to be relevant to the fact that A knew that the two pieces of silk were stolen by B from C.[1]

(*b*) A is charged with uttering, on the 12th December, 1854, a counterfeit crown piece, knowing it to be counterfeit.

The facts that A uttered another counterfeit crown piece on the 11th December, 1854, and a counterfeit shilling on the 4th January, 1855, are deemed to be relevant to show A's knowledge that the crown piece uttered on the 12th was counterfeit.[2]

(*c*) A is charged with attempting to obtain money by false pretences, by trying to pledge to B a worthless ring as a diamond ring.

The facts that two days before, A tried, on two separate occasions,

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[1] Dunn's Case, 1 Moo. C. C. 146; {Copperman *v.* People, 56 N. Y. 591; Shriedly *v.* State, 23 Ohio St. 130; Devoto *v.* Com., 3 Met. (Ky.) 142. But receiving other stolen property from other thieves is irrelevant. Coleman *v.* People, 58 N. Y. 81.}

[2] R. *v.* Forster, Dear. 456; {Bersh *v.* State, 13 Ind. 434; Bottomley *v.* United States, 1 Story, C. Ct. 143; Butler *v.* Collins, 12 Cal. 457; Pierce *v.* Hoffman, 24 Vt. 525; Com. *v.* Stearns, 10 Met. (Mass.) 256. On the charge of forgery of the signature of a deed, evidence of affixing a false seal is relevant to show intent. People *v.* Marion, 29 Mich. 31. So is evidence of the use of a false deposition. State *v.* Williams, 27 Vt. 726. *Contra*, People *v.* Corbin, 56 N. Y. 363; following Coleman *v.* People, *ut supra*.}

to obtain money from C and D respectively, by a similar assertion as to the same or a similar ring, and that on another occasion on the same day he obtained a sum of money from E by pledging as a gold chain a chain which was only gilt, are deemed to be relevant, as showing his knowledge of the quality of the ring.[1]

(*d*) A is charged with obtaining money from B by falsely pretending that Z had authorized him to do so.

The fact that on a different occasion A obtained money from C by a similar false pretence is deemed to be irrelevant,[2] as A's knowledge that he had no authority from Z on the second occasion had no connection with his knowledge that he had no authority from Z on the first occasion.

(*e*) A sues B for damage done by a dog of B's, which B knew to be ferocious.

The facts that the dog had previously bitten X, Y, and Z, and that they had made complaints to B, are deemed to be relevant.[3]

(*f*) The question is, whether A, the acceptor of a bill of exchange, knew that the name of the payee was fictitious.

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[1] R. *v.* Francis, L. R. 2 C. C. R. 128. The case of R. *v.* Cooper, L. R. 1 Q. B. D. (C. C. R.) 19, is similar to R. *v.* Francis, and perhaps stronger. {Com. *v.* Stone, 4 Met. (Mass.) 43. See, for some sensible observations upon the rule involved in the decisions in Francis's Case, an article from the Solicitors' Journal, reprinted in the Albany Law Journal, vol. x. p. 120.

The question being whether A intentionally set fire to B's house on a certain day, it is relevant to show that on two occasions within a month prior to that day A set fire to a shed near by, and connected with the house by a flight of steps. Com. *v.* McCarthy, 119 Mass. 354. But it is irrelevant to show that the prisoner committed larceny at another time. Shaser *v.* State, 36 Wis. 429.

On an indictment for obtaining money by the false pretences that a certain certificate of stock in a railroad is genuine, the fact that about the same time, both before and after, he had made the same false pretences to other persons as to certificates of stock in other corporations, is relevant to show guilty knowledge. Com. *v.* Coe, 115 Mass. 481. See also, for further illustrations of this rule, 1 Greenl. Ev. § 53, n.}

[2] R. *v.* Holt, Bell, C. C. 280; and see R. *v.* Francis, *ub. sup.* p. 130. {This case does not seem to be consistent with either the English or American cases cited in the previous illustrations to this article. See also Rex *v.* Wiley, 1 New Rep. 92; 1 Greenl. Ev. § 53.}

[3] See cases collected in Roscoe's Nisi Prius, 739.

The fact that A had accepted other bills drawn in the same manner before they could have been transmitted to him by the payee, if the payee had been a real person, is deemed to be relevant, as showing that A knew that the payee was a fictitious person.[1]

(*g*) A sues B for a malicious libel. Defamatory statements made by B regarding A for ten years before those in respect of which the action is brought are deemed to be relevant to show malice.[2]

(*h*) A is sued by B for fraudulently representing to B that C was solvent, whereby B, being induced to trust C, who was insolvent, suffered loss.

The fact that, at the time when A represented C to be solvent, C was to A's knowledge supposed to be solvent by his neighbors and by persons dealing with him, is deemed to be relevant, as showing that A made the representation in good faith.[3]

(*i*) A is sued by B for the price of work done by B, by the order of C, a contractor, upon a house, of which A is owner.

A's defence is that B's contract was with C.

The fact that A paid C for the work in question is deemed to be relevant, as proving that A did, in good faith, make over to C the management of the work in question, so that C was in a position to contract with B on C's own account, and not as agent for A.[4]

(*j*) A is accused of stealing property which he had found, and the question is, whether he meant to steal it when he took possession of it.

The fact that public notice of the loss of the property had been given in the place where A was, and in such a manner that A knew or probably might have known of it, is deemed to be relevant, as showing that A did not, when he took possession of it, in good faith believe that the real owner of the property could not be found.[5]

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[1] Gibson *v.* Hunter, 2 H. Bl. 288; {1 Greenl. Ev. § 53.}

[2] Barrett *v.* Long, 3 H. L. C. 395, 414. {Words of a different import are not relevant. Howard *v.* Sexton, 4 N. Y. 157. Some cases hold only such words as are not actionable, relevant; others hold subsequent words relevant only when they explain ambiguities in the alleged slanderous words. See 2 Greenl. Ev. § 418.}

[3] Sheen *v.* Bumpstead, 2 H. & C. 193. {The fact that A was reputed insolvent amongst his neighbors, is evidence that B, who was one of his neighbors, had reason to believe him insolvent. Lee *v.* Kilburn, 3 Gray (Mass.), 594; Brander *v.* Ferridy, 16 La. 296.}

[4] Gerish *v.* Chartier, 1 C. B. 13.

[5] This illustration is adapted from Preston's Case, 2 Den. C. C. 353; but the misdirection given in that case is set right. As to the relevancy of the fact, see in particular Lord Campbell's remark on p. 359.

(*k*) The question is, whether A is entitled to damages from B, the seducer of A's wife.

The fact that A's wife wrote affectionate letters to A before the adultery was committed, is deemed to be relevant, as showing the terms on which they lived and the damage which A sustained.[1]

(*l*) The question is, whether A's death was caused by poison.

Statements made by A before his illness as to his state of health, and during his illness as to his symptoms, are deemed to be relevant facts.[2]

(*m*) The question is, what was the state of A's health at the time when an insurance on her life was effected by B.

Statements made by A as to the state of her health at or near the time in question are deemed to be relevant facts.[3]

(*n*) The question is, whether A, the captain of a ship, knew that a port was blockaded.

The fact that the blockade was notified in the Gazette is deemed to be relevant.[4]

ARTICLE 12.*

FACTS SHOWING SYSTEM.

When there is a question whether an act was accidental or intentional, the fact that such act formed part of a series of similar occurrences, in each of which the person doing the act was concerned, is deemed to be relevant.

Illustrations.

(*a*) A is accused of setting fire to his house in order to obtain money for which it is insured.

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* See Appendix, Note VI.

[1] Trelawney *v.* Coleman, 1 B. & A. 90. {If written before her misconduct, and not open to the suspicion of collusion. 1 Greenl. Ev. § 102.}

[2] R. *v.* Palmer. See my "Gen. View of Crim. Law," pp. 363, 377 (evidence of Dr. Savage and Mr. Stephens). {Barber *v.* Merriam, 11 Allen (Mass.), 322.}

[3] Aveson *v.* Lord Kinnaird, 6 Ea. 188. {Kelsey *v.* Universal Life Ins. Co., 35 Conn. 225. But the statements must be of the state of health at the time of the statement. A subsequent narration of the state of health before is irrelevant. Fraternal Mutual Life Ins. Co. *v.* Applegate, 7 Ohio St. 292; Ill. Cen. R. R. Co. *v.* Sutton, 42 Ill. 438; Edington *v.* Mutual Life Ins. Co., Ct. of App. N. Y., 3 L. & Eq. Reptr. 141; 1 Greenl. Ev. § 102.}

[4] Harratt *v.* Wise, 9 B. & C. 712.

The facts that A had previously lived in two other houses successively, each of which he insured, in each of which a fire occurred, and that after each of those fires A received payment from a different insurance office, are deemed to be relevant, as tending to show that the fires were not accidental.[1]

(*b*) A is employed to pay the wages of B's laborers, and it is A's duty to make entries in a book showing the amounts paid by him. He makes an entry showing that on a particular occasion he paid more than he really did pay.

The question is, whether this false entry was accidental or intentional.

The fact that for a period of two years A made other similar false entries in the same book, the false entry being in each case in favor of A, is deemed to be relevant.[2]

(*c*) The question is, whether the administration of poison to A, by Z, his wife, in September, 1848, was accidental or intentional.

The facts that B, C, and D (A's three sons), had the same poison administered to them in December, 1848, March, 1849, and April, 1849, and that the meals of all four were prepared by Z, are deemed to be relevant, though Z was indicted separately for murdering A, B, and C, and attempting to murder D.[3]

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[1] R. *v.* Gray, 4 F. & F. 1102. {On the issue whether a fire was incendiary or accidental, evidence that an attempt was made to set fire to another building, in the same village and on the same night, is relevant. Faucet *v.* Nichols, N. Y. Ct. of App., 2 N. Y. Weekly Dig. 332.

When a defendant, tried for suffocating her infant in bed, claimed that it was accidental, evidence that the defendant had had four other children, who died at an early age by causes not shown, is relevant to rebut the theory of accident. Reg. *v.* Roden, 12 Cox, C. C. 330.

On a trial for infanticide, a confession by the defendant that she had before had a child which she had put away was admitted. State *v.* Shackford, 69 N. C. 486.}

[2] R. *v.* Richardson, 2 F. & F. 343. {The fact that most of the items in an account are shown by the vouchers to be overcharges, is relevant, on the question whether the other items are overcharged. Bush *v.* Guion, 6 La. Ann. 798.}

[3] R. *v.* Geering, 18 L. J. M. C. 215; cf. R. *v.* Garner, 3 F. & F. 681; {Reg. *v.* Cotton, 12 Cox, C. C. 400.}

ARTICLE 13.*

EXISTENCE OF COURSE OF BUSINESS WHEN DEEMED TO BE RELEVANT.

When there is a question whether a particular act was done, the existence of any course of office of business, according to which it naturally would have been done, is a relevant fact.

When there is a question whether a particular person held a particular public office, the fact that he acted in that office is deemed to be relevant.[1]

Illustrations.

(*a*) The question is, whether a letter was sent on a given day.

The post-mark upon it is deemed to be a relevant fact.[2]

(*b*) The question is, whether a particular letter was despatched.

The facts that all letters put in a certain place were, in the common course of business, carried to the post, and that that particular letter was put in that place, are deemed to be relevant.[3]

(*c*) The question is, whether a particular letter reached A.

The facts that it was posted in due course properly addressed, and was not returned through the Dead Letter Office, are deemed to be relevant.[4] {So of a telegraphic despatch. Com. *v.* Jeffries, 7 Allen (Mass.), 548.}

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* See Appendix, Note VII.

[1] 1 Ph. Ev. 449; R. N. P. 46; T. E. § 139; {1 Greenl. Ev. §§ 40, n., 83, 92.}

[2] R. *v.* Canning, 19 S. T. 370. {The date of a letter or other paper is, from the usual course of business, to be presumed to be true. Malpas *v.* Clements, 19 L. J. Q. B. 435. Papers on file, opened, are presumed to have been opened by order of court. Eiker *v.* McAllister, Sup. Ct. Md. 1876.}

[3] Hetherington *v.* Kemp, 4 Camp. 193; and see Skilbeck *v.* Garbett, 7 Q. B. 846; {Lothrop *v.* Greenfield, &c. Ins. Co., 2 Allen (Mass.), 82.}

[4] Warren *v.* Warren, 1 C. M. & R. 250; Woodcock *v.* Houldsworth, 16 M. & W. 124. Many cases on this subject are collected in Roscoe's Nisi Prius, pp. 374, 375.

CHAPTER IV.

HEARSAY IRRELEVANT EXCEPT IN CERTAIN CASES.

ARTICLE 14.*

HEARSAY AND THE CONTENTS OF DOCUMENTS IRRELEVANT.

(*a*) THE fact that a statement was made by a person not called as a witness, and

(*b*) the fact that a statement is contained or recorded in any book, document, or record whatever, proof of which is not admissible on other grounds,

are respectively deemed to be irrelevant to the truth of the matter stated, except (as regards (*a*)) in the cases contained in the first section of this chapter;[1]

and except (as regards (*b*)) in the cases contained in the second section of this chapter.

Illustrations.

(*a*) A declaration by a deceased attesting witness to a deed that he had forged it, is deemed to be irrelevant to the question of its validity.[2]

(*b*) The question is, whether A committed murder by causing B

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* See Appendix, Note VIII.

[1] It is important to observe the distinction between the principles which regulate the admissibility of the statements contained in a document and those which regulate the manner in which they must be proved. On this subject see the whole of Part II.

[2] Stobart *v.* Dryden, 1 M. & W. 615. {The soundness of this doctrine has been questioned in this country, and declarations of a deceased attesting witness, inconsistent with the inference from proof of his signature that the will was duly executed, were admitted in Reformed Dutch Church *v.* Ten Eyck, 1 Dutch. (N. J.) 40, affirmed

to be executed by martial law. The finding of a Commission of Inquiry into the facts of the case would be deemed to be irrelevant even if the Commission had power by statute to take evidence on oath.[1]

SECTION I.

HEARSAY WHEN RELEVANT.

ARTICLE 15.*

ADMISSIONS DEFINED.

An admission is a statement oral or written, suggesting any inference as to any fact in issue or relevant or deemed to be relevant to any such fact, made by or on behalf of any party to any proceeding. Every admission is (subject to the rules hereinafter stated) deemed to be a relevant fact as against the person by or on whose behalf it is made, but not in his favor unless it is or is deemed to be relevant for some other reason.[2]

ARTICLE 16.†

WHO MAY MAKE ADMISSIONS ON BEHALF OF OTHERS, AND WHEN.

Admissions may be made on behalf of the real party to any proceeding —

By any nominal party to that proceeding;

{1 Greenl. Ev. § 171.}

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* See Appendix, Note IX. † See Appendix, Note X.

in Otterson *v.* Hofford, 36 N. J. 129. See also Crouse *v.* Miller, 10 Serg. & Rawle (Pa.), 155. So the bad character of the attesting witness was held relevant in rebuttal of the like inference. Losee *v.* Losee, 2 Hill (N. Y.), 609.}

[1] Suggested by the proceedings against Mr. Eyre in 1867. I suppose, if the case had gone to trial, no one would have even thought of tendering the report of the Jamaica Commission in evidence.

[2] {Statements, part of the *res gestæ*, though favorable to the party making them, are relevant. See Hart *v.* Powell, 18 Ga. 635; 1 Greenl. Ev. § 108, n. 2, p. 130.}

By any person who, though not a party to the proceeding, has a substantial interest in the event;

{1 Greenl. § 180.}

By any one who is privy in law, in blood, or in estate to any party to the proceeding on behalf of that party.

{1 Greenl. Ev. 189.}

A statement made by a party to a proceeding may be an admission whenever it is made, unless it is made by a person suing or sued in a representative character only, in which case [it seems] it must be made whilst the person making it sustains that character.

{1 Greenl. Ev. § 179.}

A statement made by a person interested in a proceeding, or by a privy to any party thereto, is not an admission unless it is made during the continuance of the interest which entitles him to make it, {and only as affecting his interest. 1 Greenl. Ev. § 180.}

Illustrations.

(*a*) The assignee of a bond sues the obligor in the name of the obligee.

An admission on the part of the obligee that the money due has been paid is deemed to be relevant on behalf of the defendant.[1]

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[1] See Moriarty *v.* L. C. & D. Co., L. R. 5 Q. B. 320. {If such admissions, made after an assignment, are relevant, as they may be by the English practice, though the observation of Blackburn, J., in the case cited by the author upon this point, was a *dictum* merely, and the cause was not that of a mere nominal plaintiff having no interest, but of a husband suing with his wife for injuries to the wife, in this country, the fact of an assignment prior to these admissions is relevant, in reply, to control the effect of the admissions. 1 Greenl. Ev. §§ 172–177. Though the courts of some States may have followed the strict common-law rule, we apprehend that it is now the general rule in this country that neither the declarations of a nominal plaintiff, after his interest has passed from him (Butler *v.* Millet, 47 Me. 492; Thompson *v.* Drake, 32 Ala. 99; Dazey *v.* Mills,

(*b*) An admission by the assignee of the bond in the last illustration would also be deemed to be relevant on behalf of the defendant.

(*c*) A statement made by a person before he becomes the assignee of a bankrupt is not deemed to be relevant as an admission by him in a proceeding by him as such assignee.[1]

(*d*) Statements made by a person as to a bill of which he had been the holder are deemed not to be relevant as against the holder, if they are made after he has negotiated the bill.[2]

ARTICLE 17.*

ADMISSIONS BY AGENTS AND PERSONS JOINTLY INTERESTED WITH PARTIES.

Admissions may be made by agents authorized to make them either expressly or by the conduct of their principals; but a statement made by an agent is not an ad-

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* See Appendix, Note XI.

5 Gilman (Ill.), 67; Frear *v.* Evertson, 20 Johns. (N.Y.) 142; Sargeant *v.* Sargeant, 18 Vt. 371), will be admitted in evidence, nor a discharge by him admitted as a valid defence. Kimball *v.* Huntington, 10 Wend. (N. Y.) 677; Welch *v.* Mandeville, 1 Wheat. (U. S.) 233; 1 Greenl. Ev. § 173.}

[1] Fenwick *v.* Thornton, M. & M. 51 (by Lord Tenterden). In Smith *v.* Morgan, 2 M. & R. 257, Tindal, C. J., decided exactly the reverse. {1 Greenl. Ev. § 179. The statements of a party named as an executor and legatee in a will, appellee in the proceedings, as to the mental unsoundness of the testator, are relevant on probate of the will. Robinson *v.* Hutchinson, 31 Vt. 443; 1 Greenl. Ev. § 174.}

[2] Pocock *v.* Billing, 2 Bing. 269. {When one has parted with his title to property, his subsequent declarations in disparagement of his title cannot be received against a party who has acquired it in good faith. Monroe *v.* Napier, 52 Ga. 385; Many *v.* Jagger, 1 Blatch. C. Ct. U. S. 372; 1 Greenl. Ev. §§ 180, 190; Sumner *v.* Cook, 12 Kan. 162. If A conveys his property to B to defraud C, and after a technical delivery is permitted by B to retain possession, the declarations of A after the assignment and while in possession, showing that the conveyance to B was fraudulent, are relevant in favor of C in a suit by C against B to recover the property. Adams *v.* Davidson, 10 N. Y. 309.}

mission merely because if made by the principal himself it would have been one.

{1 Greenl. Ev. §§ 113, 114.}

Partners and joint contractors are each other's agents for the purpose of making admissions against each other in relation to partnership transactions or joint contracts.

Barristers and solicitors are the agents of their clients for the purpose of making admissions whilst engaged in the actual management of the cause, either in court or in correspondence relating thereto; but statements made by a barrister or solicitor on other occasions are not admissions merely because they would be admissions if made by the client himself.

{1 Greenl. Ev. § 239 *et seq.*}

The fact that two persons have a common interest in the same subject-matter does not entitle them to make admissions respecting it as against each other.

In cases in which actions founded on a simple contract have been barred by the Statutes of Limitations no joint contractor or his personal representative loses the benefit of such statute, by reason only of any written acknowledgment or promise made or signed by [or by the agent duly authorized to make such acknowledgment or promise of] any other or others of them [or by reason only of payment of any principal, interest, or other money, by any other or others of them].[1]

A principal, as such, is not the agent of his surety for the purpose of making admissions as to the matters for which the surety gives security.

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[1] 9 Geo. IV. c. 14, s. 1. The words in the first set of brackets were added by 19 & 20 Vict. c. 97, s. 13. The words in the second set by s. 14 of the same Act. The language is slightly altered. {Whether this is the law in any given State may depend upon its Statutes of Limitations. See notes to Illustration (*f*), *post*.}

Illustrations.

(*a*) The question is, whether a parcel, for the loss of which a Railway Company is sued, was stolen by one of their servants. Statements made by the station-master to a police-officer, suggesting that the parcel had been stolen by a porter, are deemed to be relevant, as against the railway, as admissions by an agent.[1]

(*b*) A allows his wife to carry on the business of his shop in his absence. A statement by her that he owes money for goods supplied to the shop is deemed to be relevant against him as an admission by an agent.[2]

(*c*) A sends his servant, B, to sell a horse. What B says at the time of the sale, and as part of the contract of sale, is deemed to be a relevant fact as against A, but what B says upon the subject at some different time is not deemed to be relevant as against A[3] [though it might have been deemed to be relevant if said by A himself].

(*d*) The question is, whether a ship remained at a port for an unreasonable time. Letters from the plaintiff's agent to the plaintiff containing statements which would have been admissions if made by the plaintiff himself are deemed to be irrelevant as against him.[4]

(*e*) A, B, and C sue D as partners upon an alleged contract respecting the shipment of bark. An admission by A that the bark was his exclusive property and not the property of the firm is deemed to be relevant as against B and C.[5]

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[1] Kirkstall Brewery *v.* Furness Ry., L. R. 9 Q. B. 468. {The declarations of a baggage-master as to the loss of baggage are relevant, Moore *v.* Conn., &c. R. R. Co., 6 Gray (Mass.), 430; and so would be the admissions of a general agent or president of the road, Charleston R. R. Co. *v.* Blake, 12 Rich. (S. C.) Law, 634; but not the declarations of a conductor as to the circumstances attending an accident, made after the occurrence of the accident, Griffin *v.* Mont. R. R. Co., 26 Ga. 111; Packet Co. *v.* Clough, 20 Wall. (U. S.) 540. See also, for further illustrations on this point, 1 Greenl. Ev. §§ 113, 114; Rockwell *v.* Taylor, 41 Conn. 59.}

[2] Clifford *v.* Burton, 1 Bing. 199. {When the wife is by the husband constituted his agent, then her admissions, like those of any other agent, to the extent of her authority, are relevant. 1 Greenl. Ev. § 185.}

[3] Helyear *v.* Hawke, 5 Esp. 72; {Hough *v.* Doyle, 4 Rawle (Pa.), 294.}

[4] Langhorn *v.* Allnutt, 4 Tau. 511.

[5] Lucas *v.* De La Cour, 1 M. & S. 249. {The declarations of one

(*f*) A, B, C, and D make a joint and several promissory note. Either can make admissions about it as against the rest.[1]

(*g*) The question is, whether A accepted a bill of exchange. A notice to produce the bill signed by A's solicitor and describing the bill as having been accepted by A is deemed to be a relevant fact.[2]

(*h*) The question is, whether a debt to A, the plaintiff, was due from B, the defendant, or from C. A statement made by A's solicitor to B's solicitor in common conversation that the debt was due from C is deemed not to be relevant against A.[3]

(*i*) One co-part-owner of a ship cannot, as such, make admissions against another as to the part of the ship in which they have a common interest, even if he is co-partner with that other as to other parts of the ship.[4]

(*j*) A is surety for B, a clerk. B being dismissed makes statements as to sums of money which he has received and not accounted for. These statements are not deemed to be relevant as against A, as admissions.[5]

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partner before the dissolution, in the ordinary course of business, are relevant in favor of a third party, where a creditor seeks to charge him as a partner. Danforth *v.* Carter, 4 Clark (Iowa), 230.}

[1] Whitcomb *v.* Whitting, 1 S. L. C. 644. {Whether an acknowledgment or part payment of a debt by one joint promisor will take the case out of the statute, has been a much debated question in the courts of this country, with a decided weight of authority in the negative. See Van Kuren *v.* Parmelee, 2 Comst. (N. Y.) 523; Shoemaker *v.* Benedict, 1 Kernan (N Y.), 176; Coleman *v.* Fobes, 22 Pa. 308; Bell *v.* Morrison, 1 Pet. (U. S.) 367; 1 Greenl. Ev. §§ 112, 174, notes. Angell on Limitations (6th ed.), §§ 240, 260, and notes, where the cases *pro* and *con* are very fully stated.}

[2] Holt *v.* Squire, Ry. & Mo. 282.

[3] Petch *v.* Lyon, 9 Q. B. 147.

[4] Jaggers *v.* Binning, 1 Star. 64.

[5] Smith *v.* Whippingham, 6 C. & P. 78. See also Evans *v.* Beattie, 5 Esp. 26; Bacon *v.* Chesney, 1 Star. 192; Caermarthen R. C. *v.* Manchester R. C., L. R. 8 C. P. 685; {1 Greenl. Ev. § 187. But the admission of the surety is good against both. Chapel *v.* Washburn, 17 Ind. 393.}

ARTICLE 18.*

ADMISSIONS BY STRANGERS.

Statements by strangers to a proceeding are not relevant as against the parties except in the cases hereinafter mentioned.[1]

In actions against sheriffs for not executing process against debtors, statements of the debtor admitting his debt to be due to the execution creditor are deemed to be relevant as against the sheriff.[2]

In actions by the trustees of bankrupts an admission by the bankrupt of the petitioning creditor's debt is deemed to be relevant as against the defendant.[3]

ARTICLE 19.†

ADMISSION BY PERSON REFERRED TO BY PARTY.

When a party to any proceeding expressly refers to any other person for information in reference to a matter in dispute, the statements of that other person may be admissions as against the person who refers to him.

Illustration.

The question is, whether A delivered goods to B. B says "if C" (the carman) "will say that he delivered the goods, I will pay for them." C's answer may as against B be an admission.[4] {So if a person refer to a certain document, the statements of that document upon the subject-matter of inquiry are his statements. Smith *v.* Ætna Life Ins. Co., 49 N. Y. 211; 1 Greenl. Ev. § 182.}

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* See Appendix, Note XII. † See Appendix, Note XIII.

[1] Coole *v.* Braham, 3 Ex. 183; {1 Greenl. Ev. § 181.}

[2] Kempland *v.* Macaulay, Peake, 95; Williams *v.* Bridges, 2 Star. 42.

[3] Jarrett *v.* Leonard, 2 M. & S. 265 (adapted to the new law of bankruptcy). {If made before the act of bankruptcy, 1 Greenl. Ev. § 181.}

[4] Daniel *v.* Pitt, 1 Camp. 366, n.

ARTICLE 20.*

ADMISSIONS MADE WITHOUT PREJUDICE.

No admission is deemed to be relevant in any civil action if it is made either upon an express condition that evidence of it is not to be given,[1] or under circumstances from which the judge infers that the parties agreed together that evidence of it should not be given,[2] or if it was made under duress.[3]

ARTICLE 21.

CONFESSIONS DEFINED.

A confession is an admission made at any time by a person charged with a crime, stating or suggesting the inference, that he committed that crime. Confessions, if voluntary, are deemed to be relevant facts as against the persons who make them only.

ARTICLE 22.†

CONFESSION CAUSED BY INDUCEMENT, THREAT, OR PROMISE, WHEN IRRELEVANT IN CRIMINAL PROCEEDING.

No confession is deemed to be voluntary if it appears to the judge to have been caused by any inducement,

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* See Appendix, Note XIV. † See Appendix, Note XV.

[1] Cory *v.* Bretton, 4 C. & P. 462.

[2] Paddock *v.* Forester, 5 M. & G. 918. {The rule in this country is not so strict as in England, and all admissions, not expressly to make peace, and all independent facts admitted during negotiations for settlement, are relevant. 1 Greenl. Ev. § 192; Clapp *v.* Foster, 34 Vt. 580; Harrington *v.* Lincoln, 4 Gray (Mass.), 563.}

[3] Stockfleth *v.* De Tastet, *per* Ellenborough, C. J., 4 Camp. 11. {But evidence unfairly obtained, or by an abuse of process, will not therefore be inadmissible. 1 Greenl. Ev. § 193. See also, *post*, art. 24, and notes.}

threat, or promise, proceeding from a person in authority, and having reference to the charge against the accused person, whether addressed to him directly or brought to his knowledge indirectly;

and if (in the opinion of the judge) such inducement, threat, or promise, gave the accused person reasonable grounds for supposing that by making a confession he would gain some advantage or avoid some evil in reference to the proceedings against him.

But a confession is not involuntary, only because it appears to have been caused by the exhortations of a person in authority to make it as a matter of religious duty, or by an inducement collateral to the proceeding, or by inducements held out by a person not in authority.

The prosecutor, officers of justice having the prisoner in custody, magistrates, and other persons in similar positions, are persons in authority. The master of the prisoner is not as such a person in authority if the crime of which the person making the confession is accused was not committed against him.

{1 Greenl. Ev. § 222.}

A confession is deemed to be voluntary if (in the opinion of the judge) it is shown to have been made after the complete removal of the impression produced by any inducement, threat, or promise which would otherwise render it involuntary.

Facts discovered in consequence of confessions improperly obtained, and so much of such confessions as distinctly relate to such facts, may be proved.

{"The cases excluding confessions on the ground of unlawful inducement have gone too far for the protection of crime." Kelly, C. B., Reg. *v.* Reeve, 12 Cox, 179. "The real question is, whether there has been any threat or promise of such a nature that the prisoner would be likely to tell an untruth, from fear of the threat, or hope of profit from the promise." Keating, J., Reg. *v.* Reason, 12 Cox, 228. See also Com. *v.* Cuffee, 108 Mass. 285; Fauts *v.* State,

8 Ohio, N.S. 98; State *v.* Freeman, 12 Md. 100, where the statute has interposed; Young *v.* Com., 8 Bush (Ky.), 366; Reg. *v.* Baldry, 2 Den. 430; s. c. 16 Jur. 599; s. c. 12 Eng. L. & Eq. 590. See also, upon the general subject, Mr. Green's note to Reg. *v.* Reeve, 1 Cr. Law Rep. 398; 1 Greenl. Ev. § 219 *et seq.*}

Illustrations.

(*a*) The question is, whether A murdered B.

A handbill issued by the Secretary of State, promising a reward and pardon to any accomplice who would confess, is brought to the knowledge of A, who, under the influence of the hope of pardon, makes a confession. This confession is not voluntary.[1]

(*b*) A being charged with the murder of B, the chaplain of the gaol reads the Commination Service to A, and exhorts him upon religious grounds to confess his sins. A, in consequence, makes a confession. This confession is voluntary.[2]

(*c*) The gaoler promises to allow A, who is accused of a crime, to see his wife, if he will tell where the property is. A does so. This is a voluntary confession.[3]

(*d*) A is accused of child murder. Her mistress holds out an inducement to her to confess, and she makes a confession. This is a voluntary confession, because the mistress is not a person in authority.[4]

(*e*) A is accused of the murder of B. C, a magistrate, tries to

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[1] R. *v.* Boswell, C. & Marsh. 584.

[2] R. *v.* Gilham, 1 Moo. C. C. 186. In this case the exhortation was that the accused man should confess "to God," but it seems from parts of the case that he was urged also to confess to man "to repair any injury done to the laws of his country." According to the practice at that time, no reasons are given for the judgment. The principle seems to be that a man is not likely to tell a falsehood in such cases, from religious motives. The case is sometimes cited as an authority for the proposition that a clergyman may be compelled to reveal confessions made to him professionally. It has nothing to do with the subject. {A confession made to fellow church-members is admissible. Com. *v.* Drake, 15 Mass. 161.}

[3] R. *v.* Lloyd, 6 C. & P. 393. {The hope or fear must be with reference to some advantage or disadvantage with reference to the matter on which he is held. The hope or fear of some collateral benefit or injury does not render the confession inadmissible. State *v.* Wentworth, 37 N. H. 196.}

[4] R. *v.* Moore, 2 Den. C. C. 522.

induce A to confess by promising to try to get him a pardon if he does so. The Secretary of State informs C that no pardon can be granted, and this is communicated to A. After that A makes a statement. This is a voluntary confession.[1]

(*f*) A, accused of burglary, makes a confession to a policeman under an inducement which prevents it from being voluntary. Part of it is that A had thrown a lantern into a certain pond. The fact that he said so, and that the lantern was found in the pond in consequence, may be proved.[2]

ARTICLE 23.*

CONFESSIONS MADE UPON OATH, ETC.

Evidence amounting to a confession may be used as such against the person who gives it, although it was given upon oath, and although the proceeding in which it was given had reference to the same subject-matter as the proceeding in which it is to be proved, and although the witness might have refused to answer the questions put to him; but if, after refusing to answer any such question, the witness is improperly compelled to answer it, his answer is not a voluntary confession.[3]

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* See Appendix, Note XVI.

[1] R. *v.* Clewes, 4 C. & P. 221; {Guild's Case, 5 Halst. (N. J.) 163; 1 Greenl. Ev. § 221. The influence of hope or fear being shown, it will be presumed to continue, and this presumption must be overthrown by satisfactory evidence. United States *v.* Chapman, 4 Am. L. J. N. S. 440.}

[2] R. *v.* Gould, 9 C. & P. 364. This is not consistent, so far as the proof of the words goes, with R. *v.* Warwickshall, 1 Leach, 263. {Facts discovered through inadmissible confessions are admissible. State *v.* Garrett, 71 N. C. 85; 1 Greenl. Ev. § 231; White *v.* State, 3 Heisk. (Tenn.) 338; Com. *v.* Knapp, 9 Pick. (Mass.) 496; State *v.* Vaigneur, 5 Rich. (S. C.) 391. It has been held, however, in New York, that facts obtained by a compulsory examination of a female, with a view to use against her on a criminal charge, is in violation of the constitutional provision that "no person shall be compelled in any criminal case to be a witness against himself." People *v.* McCoy, 45 How. Pr. 216. See also art. 24, *post*, and notes.}

[3] R. *v.* Garbett, 1 Den. 236.

Illustrations.

(*a*) The answers given by a bankrupt in his examination may be used against him in a prosecution for offences against the law of bankruptcy.[1]

(*b*) A is charged with maliciously wounding B.

Before the magistrates A appeared as a witness for C, who was charged with the same offence. A's deposition may be used against him on his own trial.[2]

ARTICLE 24.

CONFESSION MADE UNDER A PROMISE OF SECRECY.

If a confession is otherwise relevant, it does not become irrelevant merely because it was made under a promise of secrecy,[3] or in consequence of a deception practised on the accused person for the purpose of obtaining it,[4] or when he was drunk,[5] or because it was made in answer to questions which he need not have answered, whatever may have been the form of those questions, or

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[1] R. *v.* Scott, 1 D. & B. 47; R. *v.* Widdop, L. R. 2 C. C. 5.

[2] R. *v.* Chidley & Cummins, 8 C. C. C. 365; {1 Greenl. Ev. §§ 224, 225; Hendrickson *v.* People, 10 N. Y. 13; Com. *v.* King, 8 Gray (Mass.), 501; State *v.* Broughton, 7 Ired. (N. C.) 96. If the party testifying is under arrest, and is being examined as a suspected party, it has been held in New York that his confessions are inadmissible. People *v.* McMahon, 15 N. Y. 384; but see Schoeffler *v.* State, 3 Wis. 823.}

[3] {Com. *v.* Knapp, 9 Pick. (Mass.) 496.}

[4] {Rex *v.* Derrington, 2 C. & P. 418; 1 Greenl. Ev. §§ 229, 230. The court will not inquire how papers or witnesses are obtained, whether legally or illegally, fairly or fraudulently, or by falsehood. If relevant, the evidence will be admitted. State *v.* Graham, 74 N. C. 646; Com. *v.* Dana, 2 Met. (Mass.) 329; Leggatt *v.* Tollervey, 14 East, 302; State *v.* Jones, 54 Mo. 578; Lloyd *v.* Mastyn, 10 M. & W. 481; Cleave *v.* Jones, 21 L. J. Ex. 106.}

[5] {Eskridge *v.* State, 25 Ala. 30. If so drunk or otherwise insensible as not to be conscious of his doings, the confession is not relevant. People *v.* Robinson, 19 Cal. 40; Com. *v.* Howe, 9 Gray (Mass.), 110.}

because he was not warned that he was not bound to make such confession, and that evidence of it might be given against him.[1]

ARTICLE 25.

STATEMENTS BY DECEASED PERSONS WHEN DEEMED TO BE RELEVANT.

Statements written or verbal of facts in issue or relevant or deemed to be relevant to the issue are deemed to be relevant, if the person who made the statement is dead, in the cases, and on the conditions, specified in articles 26–31, both inclusive. In each of those articles the word "declaration" means such a statement as is herein mentioned, and the word "declarant" means a dead person by whom such a statement was made in his lifetime.

{The constitutional right of a prisoner to be confronted with the witnesses against him is no bar to the admission of dying declarations. People *v.* Glen, 10 Cal. 32; State *v.* Nash, 7 Iowa, 347; Brown *v.* Com., 73 Pa. St. 321; Walston *v.* Com., 16 B. Mon. (Ky.) 15; Burrill *v.* State, 18 Texas, 713; Com. *v.* Carey, 12 Cush. (Mass.) 247. Whether such declarations are admissible in civil cases is not agreed. See 1 Greenl. Ev. § 156, n., and § 161 *b*, note.}

ARTICLE 26.*

DYING DECLARATION AS TO CAUSE OF DEATH.

A declaration made by the declarant as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, is deemed to be relevant

{The declaration may be by signs or other appropriate modes of communication. *Post*, art. 107, and note. Such declarations can

* See Appendix, Note XVII.

[1] Cases collected and referred to in 1 Ph. Ev. 420, and T. E. s. 804. See, too, Joy, sections iii., iv., v.; {1 Greenl. Ev. § 229.}

only be admitted as would be admissible as testimony for the declarant, if alive and competent. State *v.* Williams, 68 N. C. 62; Ben *v.* State, 37 Ala. 103; Whitley *v.* State, 38 Ga. 50; 1 Greenl. Ev. § 159; State *v.* Shelton, 2 Jones (N. C.), Law, 360; Mose *v.* State, 35 Ala. 421; Brims *v.* State, 46 Ind. 311.}

only in trials for the murder or manslaughter of the declarant;

and only when the declarant is shown, to the satisfaction of the judge, to have been in actual danger of death, and to have given up all hope of recovery at the time when his declaration was made.

Such a declaration is not irrelevant merely because it was intended to be made as a deposition before a magistrate, but is irregular.

Illustrations.

(*a*) The question is, whether A has murdered B.

B makes a statement to the effect that A murdered him.

B at the time of making the statement has no hope of recovery, though his doctor had such hopes, and B lives ten days after making the statement. The statement is deemed to be relevant.[1]

B, at the time of making the statement (which is written down), says something, which is taken down thus: "I make the above statement with the fear of death before me, and with no hope of recovery." B, on the statement being read over, corrects this to "with no hope *at present* of my recovery." B dies thirteen hours afterwards. The statement is deemed to be irrelevant.[2]

(*b*) The question is, whether A administered drugs to a woman with intent to procure abortion. The woman makes a statement which would have been admissible had A been on his trial for murder. The statement is deemed to be irrelevant.[3]

(*c*) The question is, whether A murdered B. A dying declaration by C that he (C) murdered B is deemed to be irrelevant.[4]

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[1] R. *v.* Mosley, 1 Moo. 97. {McDaniel *v.* State, 16 S. & M. (Miss.) 401; *contra*, People *v.* Robinson, 2 Parker, Cr. Rep. 235; but see People *v.* Grunzig, 1 id. 299.}

[2] R. *v.* Jenkins, L. R. 1 C. C. R. 187.

[3] R. *v.* Hind, Bell, 253, following R. *v.* Hutchinson, 2 B. & C. 608, n., quoted in a note to R. *v.* Mead; {1 Greenl. Ev. § 156; Wright *v.* State, 41 Texas, 246.}

[4] Gray's Case, Ir. Cir. Rep. 76. {On the trial of C for the

(*d*) The question is, whether A murdered B.

B makes a statement before a magistrate on oath, and makes her mark to it, and the magistrate signs it, but not in the presence of A, so that her statement was not a deposition within the statute then in force. B, at the time when the statement was made, was in a dying state, and had no hope of recovery. The statement is deemed to be relevant.[1]

ARTICLE 27.*

DECLARATIONS MADE IN THE COURSE OF BUSINESS OR PROFESSIONAL DUTY.

A declaration is deemed to be relevant when it was made by the declarant in the ordinary course of business, or in the discharge of professional duty, at or near the time when the matter stated occurred,[2] and of his own knowledge.

Such declarations are deemed to be irrelevant except so far as they relate to the matter which the declarant stated in the ordinary course of his business or duty.

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* See Appendix, Note XVIII.

murder of A by poison, the dying declarations of B, who died from the effects of the same poison, were admitted against C. State *v.* Terrell, 12 Rich. (S. C.) 321; State *v.* Wilson, 23 La. Ann. 553; Rex *v.* Baker, 2 Moo. & Mal. 53; *contra*, Brown *v.* Com., 73 Pa. St. 321; State *v.* Fitzhugh, 2 Oregon, 227.

The outcries of a person deceased, made during the perpetration of an assault which results in death, or upon the approach of the assailant, are competent evidence upon the trial of a party charged with the murder of such person. So, also, are the outcries of another person, who was murdered by the same party, during the same enterprise, a few minutes before, on another part of the premises, as well on the ground that they were made under mortal terror of impending death, as upon the ground that they are part of the *res gestæ*. State *v.* Wagner, 61 Me. 178.}

[1] R. *v.* Woodcock, 1 East, P. C. 356. In this case, Eyre, C.B., is said to have left to the jury the question, whether the deceased was not in fact under the apprehension of death? 1 Leach, 504. The case was decided in 1789. It is now settled that the question is for the judge.

[2] Doe *v.* Turford, 3 B. & Ad. 898; {1 Greenl. Ev. § 116.}

Illustrations.

(*a*) The question is, whether A delivered certain beer to B.

The fact that a deceased drayman of A's, on the evening of the delivery, made an entry to that effect in a book kept for the purpose, in the ordinary course of business, is deemed to be relevant.[1]

(*b*) The question is, what were the contents of a letter not produced after notice.

A copy entered immediately after the letter was written, in a book kept for that purpose, by a deceased clerk, is deemed to be relevant.[2]

(*c*) The question is, whether A was arrested at Paddington, or in South Molton Street.

A certificate annexed to the writ by a deceased sheriff's officer, and returned by him to the sheriff, is deemed to be relevant so far as it relates to the fact of the arrest; but irrelevant so far as it relates to the place where the arrest took place.[3]

(*d*) The course of business was for A, a workman in a coal-pit, to tell B, the foreman, what coals were sold, and for B (who could not write) to get C to make entries in a book accordingly.

The entries (A and B being dead) are deemed to be irrelevant, because B, for whom they were made, did not know them to be true.[4]

(*e*) The question is, what is A's age. A statement made by the incumbent in a register of baptisms that he was baptized on a given day is deemed to be relevant. A statement in the same register that he was born on a given day is deemed to be irrelevant, because it was not the incumbent's duty to make it.[5]

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[1] Price *v.* Torrington, 1 S. L. C. 328, 7th ed. {See, for further illustrations of this rule, 1 Greenl. Ev. §§ 116, 120, and notes. But in this country, declarations or entries by the party himself, in his own account-books, touching goods sold or services rendered, or money loaned, to a limited amount, being made in the course of business, and as a part of the general transaction to which they relate, and so connected as to give rise to the inference of previous acts, from the fact of the entry, are relevant. See the cases illustrative very fully collected, 1 Greenl. Ev. §§ 118, 119, and notes.}

[2] Pritt *v.* Fairclough, 3 Camp. 305.

[3] Chambers *v.* Bernasconi, 1 C. M. & R. 347; see, too, Smith *v.* Blakey, L. R. 2 Q. B. 326.

[4] Brain *v.* Preece, 11 M. & W. 773. {It is probable that such entries would be held admissible in this country. Harwood *v.* Mulry, 8 Gray (Mass.), 250; but see Lewis *v.* Kramer, 3 Md. 265.}

[5] R. *v.* Clapham, 4 C. & P. 29; {Kennedy *v.* Doyle, 10 Allen (Mass.), 161.}

ARTICLE 28.*

DECLARATIONS AGAINST INTEREST.

A declaration is deemed to be relevant if the declarant had peculiar means of knowing the matter stated, if he had no interest to misrepresent it, and if it was opposed to his pecuniary or proprietary interest.[1] The whole of any such declaration, and of any other statement referred to in it, is deemed to be relevant, although matters may be stated which were not against the pecuniary or proprietary interest of the declarant; but statements, not referred to in, or necessary to explain such declarations, are not deemed to be relevant merely because they were made at the same time or recorded in the same place.[2]

A declaration may be against the pecuniary interest of the person who makes it, if part of it charges him with a liability, though other parts of the book or document in which it occurs may discharge him from such liability in whole or in part, and [it seems] though there may be no proof other than the statement itself either of such liability or of its discharge in whole or in part.[3]

A statement made by a declarant holding a limited interest in any property and opposed to such interest is deemed to be relevant only as against those who claim under him, and not as against the reversioner.[4]

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* See Appendix, Note XIX.

[1] These are almost the exact words of Bayley, J., in Gleadow *v.* Atkin, 1 C. & M. 423; {Taylor *v.* Gould, 57 Pa. St. 152; Pearse *v.* Jenkins, 10 Ired. (N. C.) L. 355. Upon principle, such declarations ought to be admitted, if the witness, though living, cannot be compelled to attend court or to testify. Chaffee *v.* United States, 18 Wall. (U. S.) 516; Harriman *v.* Brown, 8 Leigh (Va.), 697; 1 Greenl. Ev. § 147 *et seq.*; Beedy *v.* Macomber, 47 Me. 451; Blatner *v.* Weis, 19 Ill. 246.}

[2] Illustrations (*a*), (*b*), and (*c*).

[3] Illustrations (*d*) and (*e*).

[4] Illustration (*g*); see Lord Campbell's judgment in case quoted, p. 177.

An endorsement or memorandum of a payment made upon any promissory note, bill of exchange, or other writing, by or on behalf of the party to whom such payment was made, is not sufficient proof of such payment to take the case out of the operation of the Statutes of Limitation;[1] but any such declaration made in any other form by or by the direction of the person to whom the payment was made is when such person is dead sufficient proof for the purpose aforesaid.[2]

Any endorsement or memorandum to the effect above mentioned made upon any bond or other specialty by a deceased person, is regarded as a declaration against the proprietary interest of the declarant for the purpose above mentioned, if it is shown to have been made at the time when it purports to have been made;[3] but it is uncertain whether the date of such endorsement or memorandum may be presumed to be correct without independent evidence.[4]

Statements of relevant facts opposed to any other than the pecuniary or proprietary interest of the declarant are not deemed to be relevant as such.[5]

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[1] 9 Geo. IV. c. 14, s. 3.

[2] Bradley *v.* James, 13 C. B. 822.

[3] 3 & 4 Will. IV. c. 42, which is the Statute of Limitations relating to Specialties, has no provision similar to 9 Geo. IV. c. 14, s. 3. Hence, in this case the ordinary rule is unaltered.

[4] See the question discussed in 1 Ph. Ev. 302-305, and T. E. ss. 625-629, and see article 85. {The authorities in this country would seem to confirm the doctrine of Lord Ellenborough in Rose *v.* Bryant, 2 Camp. 321, that such endorsements cannot be admitted unless they are proved to have been written at a time when they must have been against the endorser's interest. Roseboom *v.* Billington, 17 Johns. (N. Y.) 182; Clap *v.* Ingersol, 2 Fairf. (Me.) 83; Coffin *v.* Bucknam, 3 id. 82; Beatty *v.* Clement, 12 La. Ann. 471; Adams *v.* Seitzenger, 1 S. & R. (Pa.) 243.}

[5] Illustration (*h*).

Illustrations.

(*a*) The question is, whether a person was born on a particular day.

An entry in the book of a deceased man-midwife in these words is deemed to be relevant:[1]

"W. Fowden, Junr.'s wife,
Filius circa hor. 3 post merid. natus H.
W. Fowden, Junr.,
Ap. 22, filius natus,
Wife, £1 6*s.* 1*d.*,
Pd. 25 Oct., 1768."

(*b*) The question is, whether a certain custom exists in a part of a parish.

The following entries in the parish books, signed by deceased church-wardens, are deemed to be relevant —

"It is our ancient custom thus to proportion church-lay. The chapelry of Haworth pay one-fifth, &c."

Followed by —

"Received of Haworth, who this year disputed this our ancient custom, but after we had sued him, paid it accordingly — £8, and £1 for costs."[2] {A credit by the assessors of A's tax for a given year is evidence against the town. Boston *v.* Weymouth, 4 Cush. (Mass.) 538. But the *oral* declarations of a deceased collector that a tax had been paid were held irrelevant, in Framingham *v.* Barnard, 1 Met. (Mass.) 524, the court observing that Higham *v.* Ridgway went no farther than to admit written declarations or entries.}

(*c*) The question is, whether a gate on certain land, the property of which is in dispute, was repaired by A.

An account by a deceased steward, in which he charges A with the expense of repairing the gate is deemed to be irrelevant, though it would have been deemed to be relevant if it had appeared that A admitted the charge.[3]

(*d*) The question is, whether A received rent for certain land.

A deceased steward's account, charging himself with the receipt of such rent for A, is deemed to be relevant, although the balance of the whole account is in favor of the steward.[4]

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[1] Higham *v.* Ridgway, 2 Smith, L. C. 318, 7th ed.; {Thompson *v.* Stevens, 2 Nott & McCord (S. C.), 493.}

[2] Stead *v.* Heaton, 4 T. R. 669.

[3] Doe *v.* Beviss, 7 C. B. 456.

[4] Williams *v.* Graves, 8 C. & P. 592.

(*e*) The question is, whether certain repairs were done at A's expense.

A bill for doing them, receipted by a deceased carpenter, is deemed to be { relevant[1] / irrelevant[2] } there being no other evidence either that the repairs were done or that the money was paid.

(*f*) The question is, whether A (deceased) gained a settlement in the parish of B by renting a tenement.

A statement made by A, whilst in possession of a house, that he had paid rent for it, is deemed to be relevant, because it reduces the interest which would otherwise be inferred from the fact of A's possession.[3]

(*g*) The question is, whether there is a right of common over a certain field.

A statement by A, a deceased tenant for a term of the land in question, that he had no such right, is deemed to be relevant as against his successors in the term, but not as against the owner of the field.[4]

(*h*) The question is, whether A was lawfully married to B.

A statement by a deceased clergyman that he performed the marriage under circumstances which would have rendered him liable to a criminal prosecution, is not deemed to be relevant as a statement against interest.[5]

ARTICLE 29.

DECLARATIONS BY TESTATORS AS TO CONTENTS OF WILL.

When there is a question as to the contents of a lost will, the declarations of the deceased testator as to its contents are deemed to be relevant, whether they were made before or after the loss of the will.[6]

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[1] R. *v.* Heyford, note to Higham *v.* Ridgway, 2 S. L. C. 333, 7th ed.

[2] Doe *v.* Vowles, 1 Mo. & Ro. 261. {It is probable that this case would not now be followed even in England. Taylor, Ev. § 610.}

[3] R. *v.* Exeter, L. R. 4 Q. B. 341.

[4] Papendick *v.* Bridgewater, 5 E. & B. 166.

[5] Sussex Peerage Case, 11 C. & F. 108.

[6] Sugden *v.* St. Leonards, L. R. 1 P. D. (C. A.) 154. In questions between the heir and the legatee or devisor such statements would probably be relevant as admissions by a privy in law, estate, or

ARTICLE 30.*

DECLARATIONS AS TO PUBLIC AND GENERAL RIGHTS.

Declarations are deemed to be relevant (subject to the third condition mentioned in the next article) when they relate to the existence of any public or general right or custom or matter of public or general interest. But declarations as to particular facts from which the existence of any such public or general right or custom or matter of public or general interest may be inferred, are deemed to be irrelevant.

{1 Greenl. Ev. §§ 127, 138. Such declarations, being allowed on the ground of the absence of better evidence from the nature of the case, if it appears that there is better evidence of the facts sought to be proved, will not be admitted. Glover *v.* Millings, 2 S. & P. (Ala.) 28; Dillingham *v.* Snow, 5 Mass. 552; 1 Greenl. Ev. § 127.}

A right is public if it is common to all Her Majesty's subjects, {or all the citizens of a State,} and declarations as to public rights are relevant, whoever made them.

{1 Greenl. Ev. § 128.}

A right or custom is general if it is common to any considerable number of persons, as the inhabitants of a parish, or the tenants of a manor.

{Ibid.}

Declarations as to general rights are deemed to be relevant only when they were made by persons who are shown, to the satisfaction of the judge, or who appear

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blood. {This case overruled Quick *v.* Quick, 3 Sw. & Tr. 442, as to the admissibility of statements made after the execution, and is a decided relaxation of the former strictness as to proof of the contents of a lost will. The declarations of a deceased grantor as to the contents of a lost deed may be admissible. Metcalf *v.* Van Benthuysen, 3 Comst. (N. Y.) 424.}

* See Appendix, Note XX. Also see Weeks *v.* Sparke, 1 M. & S. 679; Crease *v.* Barrett, 1 C. M. & R. 917.

from the circumstances of their statement, to have had competent means of knowledge.

{1 Greenl. Ev. § 136.}

Such declarations may be made in any form and manner.

{1 Greenl. Ev. § 139.}

Illustrations.

(*a*) The question is, whether a road is public.

A statement by A (deceased) that it is public is deemed to be relevant.[1]

A statement by A (deceased) that he planted a willow (still standing) to show where the boundary of the road had been when he was a boy is deemed to be irrelevant.[2]

(*b*) The following are instances of the manner in which declarations as to matters of public and general interest may be made:— They may be made in

Maps prepared by or by the direction of persons interested in the matter;[3]

Copies of Court rolls;[4]

Deeds and leases between private persons;[5]

Verdicts, judgments, decrees, and orders of Courts, and similar bodies[6] if final.[7]

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[1] Crease *v.* Barrett, per Parke, B., 1 C. M. & R. 929. {The incorporation of a town may be thus proved. Dillingham *v.* Snow, 5 Mass. 552.}

[2] R. *v.* Bliss, 7 A. & E. 550. {So is a declaration that a certain spring was on one side of a boundary line. Frazier *v.* Hunter, 5 Cranch, C. Ct. U. S. 470. But in this country ancient private boundaries may be proved by the declarations of deceased persons having knowledge to a very considerable extent, the doctrines of the common law being somewhat relaxed by the peculiarities growing out of the situation of certain sections of the country. Sasser *v.* Herring, 3 Dev. (N. C.) 340; Speer *v.* Coate, 3 McCord (S. C.), 227; Kinney *v.* Farnsworth, 17 Conn. 355; Smith *v.* Prewitt, 2 A. K. Marsh. (Ky.) 155; Great Falls Co. *v.* Worster, 15 N. H. 437; 1 Greenl. Ev. § 145, and note.}

[3] Implied in Hammond *v.* Bradstreet, 10 Ex. 390, and Pipe *v.* Fulcher, 1 E. & E. 111. In each of these cases the map was rejected as not properly qualified.

[4] Crease *v.* Barrett, 1 C. M. & R. 928.

[5] Plaxton *v.* Dare, 10 B. & C. 17.

[6] Duke of Newcastle *v.* Broxtowe, 4 B. & Ad. 273.

[7] Pim *v.* Curell, 6 M. & W. 234, 266.

ARTICLE 31.*

DECLARATIONS AS TO PEDIGREE.

A declaration is deemed to be relevant (subject to the conditions hereinafter mentioned) if it relates to the existence of any relationship between persons, whether living or dead, or to the birth, marriage, or death of any person, by which such relationship was constituted, or to the time or place at which any such fact occurred, or to any fact immediately connected with its occurrence.[1]

Such declarations may express either the personal knowledge of the declarant, or information given to him by other persons qualified to be declarants, but not information collected by him from persons not qualified to be declarants.[2] They may be made in any form and in any document or upon any thing in which statements as to relationship are commonly made.[3]

The conditions above referred to are as follows: —

(1) Such declarations are deemed to be relevant only in cases in which the pedigree to which they relate is in issue, and not to cases in which it is only relevant to the issue;[4]

(2) They must be made by a declarant shown to be legitimately related by blood to the person to whom they relate; or by the husband or wife of such a person.[5]

(3) They must be made before the question in relation to which they are to be proved has arisen; but they do

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* See Appendix, Note XXI.

[1] Illustration (*a*).

[2] Davies *v.* Lowndes, 6 M. & G. 527; {Stein *v.* Bowman, 13 Pet. (U. S.) 209; Chapman *v.* Chapman, 2 Conn. 347; Jackson *v.* Browner, 18 Johns. (N. Y.) 37.}

[3] Illustration (*c*).

[4] Illustration (*b*).

[5] Shrewsbury Peerage Case, 7 H. L. C. 26; {Jewell *v.* Jewell, 1 How. (U. S.) 231.}

not cease to be deemed to be relevant because they were made for the purpose of preventing the question from arising.[1]

This condition applies also to statements as to public and general rights or customs and matters of public and general interest.

Illustrations.

(*a*) The question is, which of three sons (Fortunatus, Stephanus, and Achaicus) born at a birth is the eldest.

The fact that the father said that Achaicus was the youngest, and he took their names from St. Paul's Epistles (see 1 Cor. xvi. 17), and the fact that a relation present at the birth said that she tied a string round the second child's arm to distinguish it, are relevant.[2]

(*b*) The question is, whether one of the *cestuis que vie* in a lease for lives is living.

The fact that he was believed in his family to be dead is deemed to be irrelevant, as the question is not one of pedigree.[3]

(*c*) The following are instances of the ways in which statements as to pedigree may be made: By family conduct or correspondence; in books used as family registers; in deeds and wills; in inscriptions on tombstones, or portraits; in pedigrees, so far as they state the relationship of living persons known to the compiler.[4]

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[1] Berkeley Peerage Case, 4 Cam. 401–417; {1 Greenl. Ev. § 134, and n. The question arises, when the controversy or dispute arises, whether a suit has been commenced or not. 'Shedden *v.* Atty.-General, 2 Sw. & Tr. 170.}

[2] Vin. Abr. tit. Evidence, T. b. 91. The report calls the son Achicus. {Anderson *v.* Parker, 6 Cal. 161; Scott *v.* Ratcliff, 5 Pet. (U. S.) 81; Wilson *v.* Brownlee, 24 Ark. 586; Jackson *v.* Boneham, 15 Johns. (N. Y.) 226.}

[3] Whittuck *v.* Walters, 4 C. & P. 375. {The place of birth is not a question of pedigree, Adams *v.* Swansea, 116 Mass. 591; nor is residence, Londonderry *v.* Andover, 28 Vt. 416; nor is the age of a person, Roe *v.* Neal, Dudley (Ga.), 168.

[4] In 1 Ph. Ev. 203–215, and T. E. ss. 583–587, these and many other forms of statement of the same sort are mentioned; and see Davies *v.* Lowndes, 6 M. & G. 527; {1 Greenl. Ev. §§ 103–106.}

ARTICLE 32.*

EVIDENCE GIVEN IN FORMER PROCEEDING WHEN RELEVANT.

Evidence given by a witness in a previous action is relevant for the purpose of proving the matter stated in a subsequent proceeding, or in a later stage of the same proceeding, when the witness is dead,[1] or is mad,[2] or so ill that he will probably never be able to travel,[3] or is kept out of the way by the adverse party,[4] or in civil, but not, it seems, in criminal cases, is out of the jurisdiction of the Court,[5] or, perhaps, in civil, but not in criminal, cases when he cannot be found.[6]

Provided in all cases —

(1) That the person against whom the evidence is to be given had the right and opportunity to cross-examine the declarant when he was examined as a witness;[7]

{Johnson *v.* Powers, 40 Vt. 611.}

(2) That the questions in issue were substantially the same in the first as in the second proceeding;[7]

{Orr *v.* Hadley, 36 N. H. 575; Sample *v.* Coulson, 9 W. & S. (Pa.) 62; Melvin *v.* Whitney, 7 Pick. (Mass.) 79.}

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* See Appendix, Note XXII.

[1] Mayor of Doncaster *v.* Day, 3 Tau. 262.

[2] R. *v.* Eriswell, 3 T. R. 720.

[3] R. *v.* Hogg, 6 C. & P. 176.

[4] R. *v.* Scaife, 17 Q. B. 238, 243.

[5] Fry *v.* Wood, 1 Atk. 444; R. *v.* Scaife, 17 Q. B. 243.

[6] Godbolt, p. 336, case 418; R. *v.* Scaife, 17 Q. B. 243. {If the witness cannot be found, he should be regarded as dead. Shearer *v.* Harber, 35 Ind. 536. Such evidence is admissible in criminal cases. Williams *v.* State, 19 Ga. 402; Summers *v.* State, 5 Ohio St. 325; Kendricks *v.* State, 10 Humph. (Tenn.) 479; Davis *v.* State, 17 Ala. 354; Pope *v.* State, 22 Ark. 371; United States *v.* McComb, 5 McLean, 286. But see *contra*, Fenn's Case, 5 Rand. (Va.) 701, and Brogg's Case, 10 Gratt. (Va.) 722.}

[7] Doe *v.* Tatham, 1 A. & E. 319; Doe *v.* Derby, 1 A. & E. 783, 785, 789.

Provided also —

(3) That the proceeding, if civil, was between the same parties or their representatives in interest;[1]

{That there were also other parties in one or the other of the suits is immaterial. Phila., W. & B. R. R. Co. *v.* Howard, 13 How. (U. S.) 307. In Noble *v.* Martin, 7 Martin, N. S. 282, the testimony of a sheriff who was absent on official duty was admitted. Whether testimony taken before committing magistrates, coroners, and arbitrators is admissible, the cases are in conflict. See 1 Greenl. Ev. §§ 163, 164, and notes.

The old rule was, that the precise words must be proved. The modern rule is, that the substance only of the whole evidence, both in chief and in cross examination, upon the point inquired about, need be proved. 1 Greenl. Ev. § 165; Kean *v.* Com., 10 Bush (Ky.), 190. Depositions may be used, if the witness is sick and unable to attend, or has lost his memory. Emig *v.* Diehl, 76 Pa. St. 359.}

(4) That, in criminal cases, the same person is accused upon the same facts.[2]

If evidence is reduced to the form of a deposition, the provisions of article 90 apply to the proof of the fact that it was given.

The conditions under which depositions may be used as evidence are stated in articles 140–142.

SECTION II.

STATEMENTS IN BOOKS, DOCUMENTS, AND RECORDS, WHEN RELEVANT.

ARTICLE 33.

RECITALS OF PUBLIC FACTS IN STATUTES AND PROCLAMATIONS.

When any act of State or any fact of a public nature is in issue or is or is deemed to be relevant to the issue, any statement of it made in a recital contained in any

[1] Doe *v.* Tatham, 1 A. & E. 319; Doe *v.* Derby, 1 A. & E. 783, 785, 789.

[2] Beeston's Case, Dears. 405.

public Act of Parliament, or in any Royal proclamation or speech of the Sovereign in opening Parliament, or in any address to the Crown of either House of Parliament, is deemed to be a relevant fact.[1]

ARTICLE 34.

RELEVANCY OF ENTRY IN PUBLIC RECORD MADE IN PERFORMANCE OF DUTY.

An entry in any record, official book, or register kept in any of Her Majesty's dominions or at sea, or in any foreign country, stating a fact in issue or relevant or deemed to be relevant thereto, and made in proper time by any person in the discharge of any duty imposed upon him by the law of the place in which such record, book, or register is kept, is itself deemed to be a relevant fact.[2]

ARTICLE 35.

RELEVANCY OF STATEMENTS IN WORKS OF HISTORY, MAPS, CHARTS, AND PLANS.

Statements as to matters of general public history made in accredited historical books are deemed to be relevant when the occurrence of any such matter is in issue or is or is deemed to be relevant to the issue; but statements in such works as to private rights or customs are deemed to be irrelevant.[3]

[*Submitted*] Statements of facts in issue or relevant or deemed to be relevant to the issue made in published maps or charts generally offered for public sale as to

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[1] R. *v.* Francklin, 17 S. T. 636; R. *v.* Sutton, 4 M. & S. 532; {1 Greenl. Ev. § 491.}

[2] T. E. (from Greenleaf) §§ 1429, 1432; {1 Greenl. Ev. §§ 483-493.}

[3] See cases in 2 Ph. Ev. 155–156; {1 Greenl. Ev. § 6, and notes.}

matters of public notoriety, such as the relative position of towns and countries, and such as are usually represented or stated in such maps or charts, are themselves deemed to be relevant facts;[1] but such statements are irrelevant if they relate to matters of private concern, or matters not likely to be accurately stated in such documents.

ARTICLE 36.

ENTRIES IN BANKERS' BOOKS.

[2] The entries in the ledgers, day-books, cash-books, and other account-books of any bank are deemed to be relevant when any of the matters, transactions, or accounts recorded therein are or are deemed to be relevant in any proceeding, final or preliminary, civil or criminal, in any Court of Justice or in which there is power to administer an oath. If the books themselves are produced, they may be proved to be what they profess to be by the affidavit in writing of one of the partners, managers, or officers of such bank, that they are or have been the ordinary books of such bank, and that the said entries have been made in usual and ordinary course of business, and that such books are in or come immediately from the custody or control of the bank.

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[1] In R. *v.* Orton, maps of Australia were given in evidence to show the situation of various places at which the defendant said he had lived. {Maps, plans, and charts are frequently used, by way of illustration or explanation of collateral matters, and, if ancient, as evidence. 1 Greenl. Ev. § 145, n. The proposed extension of the law to maps offered for public sale, such as the public and judges resort to for information, seems unobjectionable.}

[2] 39 & 40 V. c. 48, ss. 2 and 3. As to the contents of such books by copies, see art. 71 (*f*), *post*. {This and the two following articles are the substance of statutes peculiar to England, based on the presumption that entries made in the ordinary course of business are presumably correct. 1 Greenl. Ev. § 118.}

ARTICLE 37.

EXCEPTIONS TO ARTICLE 36.

[1] Nothing contained in article 36 applies to any proceeding to which any bank whose books are so to be used is a party.

No such entry may be so used unless—

(*a*) five days' notice in writing, or such other notice as may be ordered by the Court, is given by the party proposing so to use the same to the party against whom they are to be so used. Such notice must contain a copy of the entries proposed to be so adduced. Nor unless—

(*b*) the party against whom the entries are proposed to be used is at liberty to inspect the original entries and the accounts of which such entries form a part.

ARTICLE 38.

JUDGES' POWERS AS TO BANKERS' BOOKS.

[2] Any judge of the High Court may, on the application of any party who has received such notice as aforesaid, make an order—

(*a*) That any party to a proceeding who has received such notice as is mentioned in article 37 shall be at liberty to inspect and take copies of any entry in the books of any bank relating to the matters in question in the proceeding. Such order may be made either after or

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[1] 39 & 40 V. c. 48, ss. 3 and 5 (part). Section 5 is rather awkwardly worded. The last two lines are represented I think correctly by (*b*), but it is not easy to see why they were put in, as s. 6 (see art. 38) seems to make them superfluous.

[2] (*a*) 39 & 40 V. c. 48, s. 6; (*b*) s. 7. I have here omitted an article founded on 7 James I. c. 12, about shopbooks. This enactment is practically obsolete.

without summoning[1] the bank or the other party to the proceeding, and it must be intimated to the bank at least three days before such copies are required.

(*b*) That the entries or copies mentioned in the notice aforesaid are not to be admissible as evidence of the matters recorded therein.

ARTICLE 39.*

"JUDGMENT."

The word "judgment" in articles 40–47 means any final judgment, order, or decree of any Court.

The provisions of articles 40–45, both inclusive, are all subject to the provisions of article 46.

ARTICLE 40.

ALL JUDGMENTS CONCLUSIVE PROOF OF THEIR LEGAL EFFECT.

All judgments whatever are conclusive proof as against all persons of the existence of that state of things which they actually effect when the existence of the state of things so effected is a fact in issue or is or is deemed to be relevant to the issue. The existence of the judgment effecting it may be proved in the manner prescribed in Part II.

{The record of a judgment is the only proper, and is conclusive, evidence of the rendition of the judgment, and of all the legal consequences flowing from that fact against all persons. 1 Greenl. Ev. § 538 *et seq.*; Ennis *v.* Smith, 14 How. (U. S.) 400. By the constitution of the United States, "full faith and credit" is to be given "in each State to the public acts, records, and judicial proceedings of every other State." This makes a judgment of the tribunals of one State admissible as evidence in the tribunals of another State, upon the footing of a domestic judgment, subject, however, to im-

* See Appendix, Note XXIII.

[1] "With or without summoning" are the words of the statute, which seems an odd expression.

peachment on the several grounds: 1. That the State had no right to exercise authority over the parties; 2. That the court had no jurisdiction; and, 3. That the judgment is tainted by fraud. 1 Greenl. Ev. § 548.}

Illustrations.

(*a*) The question is, whether A has been damaged by the negligence of his servant B in injuring C's horse.

A judgment in an action, in which C recovered damages against A, is conclusive proof as against B, that C did recover damages against A in that action.[1]

(*b*) The question is, whether A, a shipowner, is entitled to recover as for a loss by capture against B an underwriter.

A judgment of a competent French prize court condemning the ship and cargo as prize, is conclusive proof that the ship and cargo were lost to A by capture.[2]

(*c*) The question is, whether A can recover damages from B for a malicious prosecution.

The judgment of a Court by which A was acquitted is conclusive proof that A was acquitted by that Court.[3]

(*d*) A, as executor to B, sues C for a debt due from C to B.

The grant of probate to A is conclusive proof as against C, that A is B's executor.[4]

(*e*) A is deprived of his living by the sentence of an ecclesiastical court.

The sentence is conclusive proof of the fact of deprivation in all cases.[5]

(*f*) A and B are divorced *à vinculo matrimonii* by a sentence of the Divorce Court.

The sentence is conclusive proof of the divorce in all cases.[6]

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[1] Green *v.* New River Company, 4 T. R. 590. (See art. 44, Illustration (*a*).) {A judgment against a sheriff, on account of misconduct of his deputy, is conclusive as to the fact that the sheriff has been adjudged liable on account of the misconduct, but it is not, as against the deputy, evidence of his misconduct, unless he was notified of the suit, and required to defend it. Tyler *v.* Ulmer, 12 Mass. 166.}

[2] Involved in Geyer *v.* Aguilar, 7 T. R. 681.

[3] Leggatt *v.* Tollervey, 14 Ex. 301; and see Caddy *v.* Barlow, 1 Man. & Ry. 277; {1 Greenl. Ev. § 538.}

[4] Allen *v.* Dundas, 37 R. 125–130. In this case the will to which probate had been obtained was forged. {Mut. Ben. Life Ins. Co. *v.* Tisdale, 1 Otto (U. S.), 238.}

[5] Judgment of Lord Holt in Philips *v.* Bury, 2 T. R. 346, 351.

[6] Assumed in Needham *v.* Bremner, L. R. 1 C. P. 582; {Burlen *v.* Shannon, 3 Gray (Mass.), 387.}

ARTICLE 41.

JUDGMENTS CONCLUSIVE AS BETWEEN PARTIES AND PRIVIES OF FACTS FORMING GROUND OF JUDGMENT.

Every judgment is conclusive proof as against parties and privies of facts directly in issue in the case, actually decided by the Court, and appearing from the judgment itself to be the ground on which it was based; unless evidence was admitted in the action in which the judgment was delivered which is excluded in the action in which that judgment is intended to be proved.

{1 Greenl. Ev. §§ 528, 534; Hopkins *v.* Lee, 6 Wheaton (U. S.), 109; Bigelow *v.* Winsor, 1 Gray (Mass.), 299.}

Illustrations.

(*a*) The question is, whether C, a pauper, is settled in parish A or parish B.

D is the mother and E the father of C. D, E, and several of their children were removed from A to B before the question as to C's settlement arose, by an order unappealed against, which order described D as the wife of E.

The statement in the order that D was the wife of E is conclusive as between A and B.[1]

(*b*) A and B each claim administration to the goods of C, deceased.

Administration is granted to B, the judgment declaring that, as far as appears by the evidence, B has proved himself next of kin.

Afterwards there is a suit between A and B for the distribution of the effects of C. The declaration in the first suit is in the second suit conclusive proof as against A that B is nearer of kin to C than A.[2]

(*c*) A company sues A for unpaid premium and calls. A special case being stated in the Court of Common Pleas, A obtains judgment on the ground that he never was a shareholder.

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[1] R. *v.* Hartington Middle Quarter, 4 E. & B. 780; and see Flitters *v.* Allfrey, L. R. 10 C. P. 29; and contrast Dover *v.* Child, L. R. 1 Ex. Div. 172.

[2] Barrs *v.* Jackson, 1 Phill. 582, 587, 588.

The company being wound up in the Court of Chancery, A applies for the repayment of the sum he had paid for premium and calls. The decision that he never was a shareholder is conclusive as between him and the company that he never was a shareholder, and he is therefore entitled to recover the sums he paid.[1]

(*d*) A obtains a decree of judicial separation from her husband B, on the ground of cruelty and desertion, proved by her own evidence. Afterwards B sues A for dissolution of marriage on the ground of adultery, in which suit neither B nor A can give evidence. A charges B with cruelty and desertion. The decree in the first suit is deemed to be irrelevant in the second.[2] {1 Greenl. Ev. § 524.}

ARTICLE 42.

STATEMENTS IN JUDGMENTS IRRELEVANT AS BETWEEN STRANGERS, EXCEPT IN ADMIRALTY CASES.

Statements contained in judgments as to the facts upon which the judgment is based are deemed to be irrelevant as between strangers, or as between a party, or privy, and a stranger,[3] except[4] in the case of judgments of Courts of Admiralty condemning a ship as prize. In such cases the judgment is conclusive proof as against

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[1] Bank of Hindustan, &c., Allison's Case, L. R. 9 Ch. App. 24.

[2] Stoate *v.* Stoate, 2 Swa. & Tri. 223.

[3] {1 Greenl. Ev. §§ 523, 535.}

[4] This exception is treated by Lord Eldon as an objectionable anomaly in Lothian *v.* Henderson, 3 B. & P. 545. See, too, Castrique *v.* Imrie, L. R. 4 E. & I. App. 434, 435. {The exception includes not only judgments strictly *in rem*, but also judgments determining the personal *status* of parties, as marriage, bastardy, settlement, and the like, 1 Greenl. Ev. §§ 525, 556; and also judgments on questions of a public nature, such as customs and the like, 1 Greenl. Ev. §§ 526, 555.

Upon the question of the conclusiveness of judgments affecting the personal *status*, there is not an entire uniformity of opinion. The generally accepted doctrine seems to be, that the judgment of a court upon facts transpiring within the limits of the jurisdiction of the State whose laws it administers, is conclusive. But whether judgments upon facts not transpiring within such jurisdiction are conclusive, is not agreed. 1 Greenl. Ev. §§ 544, 545.}

all persons of the fact on which the condemnation proceeded, where such fact is plainly stated upon the face of the sentence.

Illustrations.

(*a*) The question between A and B is, whether certain lands in Kent had been disgavelled. A special verdict on a feigned issue between C and D (strangers to A and B) finding that in the 2d Edw. VI. a disgavelling Act was passed in words set out in the verdict is deemed to be irrelevant.[1]

(*b*) The question is, whether A committed bigamy by marrying B during the lifetime of her former husband C.

A decree in a suit of jactitation of marriage, forbidding C to claim to be the husband of A, on the ground that he was not her husband, is deemed to be irrelevant.[2]

(*c*) The question is, whether A, a shipowner, has broken a warranty to B an underwriter, that the cargo of the ship whose freight was insured by A was neutral property.

The sentence of a French prize court condemning ship and cargo, on the ground that the cargo was enemy's property, is conclusive proof in favor of B that the cargo was enemy's property (though on the facts the Court thought it was not).[3]

ARTICLE 43.

EFFECT OF JUDGMENT NOT PLEADED AS AN ESTOPPEL.

If a judgment is not pleaded by way of estoppel it is as between parties and privies deemed to be a relevant fact, whenever any matter which was or might have been decided in the action in which it was given is in issue or is or is deemed to be relevant to the issue in any subsequent proceeding.

Such a judgment is conclusive proof of the facts which

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[1] Doe *v.* Brydges, 6 M. & G. 282.

[2] Duchess of Kingston's Case, 2 S. L. C. 760.

[3] Geyer *v.* Aguilar, 7 T. R. 681. {In England, judgments *in rem* are conclusive upon all facts which they incidentally decide. So in some of the American States. In others, these facts may be controverted. 1 Greenl. Ev. § 543.}

it decides, or might have decided, if the party who gives evidence of it had no opportunity of pleading it as an estoppel.

{The prevailing doctrine in this country is, that the judgment, whether pleaded as an estoppel or proved in evidence, is conclusive, whether the party proving had an opportunity to plead or not. 1 Greenl. Ev. § 531, and notes. But the English rule is defended by Taylor, Ev. § 1486, n.}

Illustrations.

(*a*) A sues B for deepening the channel of a stream, whereby the flow of water to A's mill was diminished.

A verdict recovered by B in a previous action for substantially the same cause, and which might have been pleaded as an estoppel, is deemed to be relevant, but not conclusive in B's favor.[1]

(*b*) A sues B for breaking and entering A's land, and building thereon a wall and a cornice. B pleads that the land was his, and obtains a verdict in his favor on that plea.

Afterwards B's devisee sues A's wife (who on the trial admitted that she claimed through A) for pulling down the wall and cornice. As the first judgment could not be pleaded as an estoppel (the wife's right not appearing on the pleadings), it is conclusive in B's favor that the land was his.[2]

ARTICLE 44.

JUDGMENTS GENERALLY DEEMED TO BE IRRELEVANT AS BETWEEN STRANGERS.

Judgments are not deemed to be relevant as rendering probable facts which may be inferred from their existence, but which they neither state nor decide —

as between strangers;

as between parties and privies in suits where the issue is different even though they relate to the same occurrence or subject-matter;

or in favor of strangers against parties or privies.

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[1] Vooght *v.* Winch, 2 B. & A. 662; and see Feversham *v.* Emerson, 11 Ex. 391.

[2] Whitaker *v.* Jackson, 2 H. & C. 926. This had previously been doubted. See 2 Ph. Ev. 24, n. 4.

But a judgment is deemed to be relevant as between strangers:

(1) if it is an admission, or

(2) if it relates to a matter of public or general interest, so as to be a statement under article 30.

{1 Greenl. Ev. §§ 526, 555.}

Illustrations.

(*a*) The question is, whether A has sustained loss by the negligence of B his servant, who has injured C's horse.

A judgment recovered by C against A for the injury, though conclusive as against B, as to the fact that C recovered a sum of money from A, is deemed to be irrelevant to the question, whether this was caused by B's negligence.[1]

(*b*) The question whether a bill of exchange is forged arises in an action on the bill. The fact that A was convicted of forging the bill is deemed to be irrelevant.[2]

(*c*) A collision takes place between two ships A and B, each of which is damaged by the other.

The owner of A sues the owner of B, and recovers damages on the ground that the collision was the fault of B's captain. This judgment is not conclusive in an action by the owner of B against the owner of A, for the damage done to B.[3] [*Semble*, it is deemed to be irrelevant.][4]

(*d*) A is prosecuted and convicted as a prihcipal felon.

B is afterwards prosecuted as an accessory to the felony committed by A.

The judgment against A is deemed to be irrelevant as against B, though A's guilt must be proved as against B.[5]

(*e*) A sues B, a carrier, for goods delivered by A to B.

A judgment recovered by B against a person to whom he had

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[1] Green *v.* New River Company, 4 T. R. 589; {1 Greenl. Ev. § 539.}

[2] Per Blackburn, J., in Castrique *v.* Imrie, L. R. 4 E. & I. App. 434.

[3] The Calypso, 1 Swab. Ad. 28.

[4] On the general principle in Duchess of Kingston's Case, 2 S. L. C. 813.

[5] *Semble* from R. *v.* Turner, 1 Moo. C. C. 347.

delivered the goods, is deemed to be relevant as an admission by B that he had them.[1]

(*f*) A sues B for trespass on land.

A judgment, convicting A for a nuisance by obstructing a highway on the place said to have been trespassed on is [at least] deemed to be relevant to the question, whether the place was a public highway [and is possibly conclusive].[2]

ARTICLE 45.

JUDGMENTS CONCLUSIVE IN FAVOR OF JUDGE.

When any action is brought against any person for any thing done by him in a judicial capacity, the judgment delivered, and the proceedings antecedent thereto, are conclusive proof of the facts therein stated, whether they are or are not necessary to give the defendant jurisdiction, if, assuming them to be true, they show that he had jurisdiction.

Illustration.

A sues B (a justice of the peace) for taking from him a vessel and 500 lbs. of gunpowder thereon. B produces a conviction before himself of A for having gunpowder in a boat on the Thames (against 2 Geo. III. c. 28).

The conviction is conclusive proof for B, that the thing called a boat was a boat.[3]

ARTICLE 46.

FRAUD, COLLUSION, OR WANT OF JURISDICTION MAY BE PROVED.

Whenever any judgment is offered as evidence under any of the articles hereinbefore contained, the party

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[1] Buller, N. P. 242, b. {Such judgment, though relevant, is not conclusive. 1 Greenl. Ev. § 527.}

[2] Petrie *v.* Nuttall, 11 Ex. 569.

[3] Brittain *v.* Kinnaird, 1 B. & B. 432. {Inferior magistrates must show their jurisdiction by the production of the record. As to superior magistrates or judges of courts of general jurisdiction, the jurisdiction will be presumed. Piper *v.* Pearson, 2 Gray (Mass.), 120.}

against whom it is so offered may prove that the Court which gave it had no jurisdiction, or that it has been reversed, or, if he is a stranger[1] to it, that it was obtained by any fraud or collusion, to which neither he nor any person to whom he is privy was a party.[2]

ARTICLE 47.

FOREIGN JUDGMENTS.

The provisions of articles 40–46 apply to such of the judgments of Courts of foreign countries as can by law be enforced in this country, and so far as they can be so enforced.[3]

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[1] {Vose *v.* Morton, 4 Cush. (Mass.) 27.}

[2] Cases collected in T. E. ss. 1524–1525, s. 1530. See, too, 2 Ph. Ev. 85, and Ochsenbein *v.* Papelier, L. R. 8 Ch. 695; {Hopkins *v.* Lee, 6 Wheat. (U. S.) 109.}

[3] The cases on this subject are collected in the note on the Duchess of Kingston's Case, 2 S. L. C. 813–845. A list of the cases will be found in R. N. P. 221–223. The last leading cases on the subject are Godard *v.* Gray, L. R. 6 Q. B. 139, and Castrique *v.* Imrie, L. R. 4 E. & I. App. 414. {But whether foreign judgments are *prima facie*, or *conclusive*, and if conclusive, to what extent, is not agreed by the tribunals of England or of this country. See Judge Redfield's note to Story, Confl. of Laws, § 618 *et seq.*, reported in 1 Greenl. Ev. §§ 546, 547; Taylor, Ev. § 1553.}

CHAPTER V.*

OPINIONS, WHEN RELEVANT AND WHEN NOT.

ARTICLE 48.

OPINION GENERALLY IRRELEVANT.

THE fact that any person is of opinion that a fact in issue, or relevant or deemed to be relevant to the issue, does or does not exist is deemed to be irrelevant to the existence of such fact, except in the cases specified in this chapter.

{Opinions of non-experts are now receivable in this country, in all those cases where after personal observation a description without an opinion would convey an imperfect idea of what the witness testifies to, and where the opinion is a conclusion of fact; as in questions of health, identity, insanity, conduct, bearing, whether friendly or hostile, and the like. See, for a full discussion of the subject, Mr. Justice Doe's dissenting opinion, in State *v.* Pike, 49 N. H. 398, afterwards adopted by the whole court in Hardy *v.* Merrill, 56 N. H. 227; Com. *v.* Sturtivant, 117 Mass. 122; Hamilton *v.* People, 29 Mich. 173; 1 Greenl. Ev. § 440 and notes, vol. 2, § 371. *Contra*, as to insanity in New York, People *v.* Real, 42 N. Y. 270.}

Illustration.

The question is, whether A, a deceased testator, was sane or not when he made his will. His friends' opinions as to his sanity, as expressed by the letters which they addressed to him in his lifetime, are deemed to be irrelevant.[1]

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* See Appendix, Note XXIV.

[1] Wright *v.* Doe *d.* Tatham, 7 A. & E. 313. {The decision in this case was, that the language of business and friendly correspondents, implying that in their opinion the person to whom the language was addressed was sane, *there being no evidence of any act done by him in relation to the letters, or that he had any knowledge of their contents*, is inadmissible on the ground of irrelevancy.}

ARTICLE 49.

OPINIONS OF EXPERTS ON POINTS OF SCIENCE OR ART.

When there is a question as to any point of science or art, the opinions upon that point of persons specially skilled in any such matter are deemed to be relevant facts.

Such persons are hereinafter called experts.

The words "science or art" include all subjects on which a course of special study or experience is necessary to the formation of an opinion,[1] and amongst others the examination of handwriting.

When there is a question as to a foreign law the opinions of experts who in their profession are acquainted with such law are the only admissible evidence thereof, though such experts may produce to the Court books which they declare to be works of authority upon the foreign law in question, which books the Court, having received all necessary explanations from the expert, may construe for itself.[2]

It is the duty of the judge to decide, subject to the opinion of the Court above, whether the skill of any person in the matter on which evidence of his opinion is offered is sufficient to entitle him to be considered as an expert.[3]

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[1] 1 S. L. C. 555, 7th ed. (note to Carter *v.* Boehm); 28 Vict. c. 18, s. 18.

[2] Baron de Bode's Case, 8 Q. B. 250–267; Di Sora *v.* Phillipps, 10 H. L. 624; Castrique *v.* Imrie, L. R. 4 E. & I. App. 434; see, too, Picton's Case, 30 S. T. 510–511. {This is the usual course as to the unwritten law, though in some States, by statute, this may be proved by the Reports. 1 Greenl. Ev. § 488. The written law must be proved by a copy. There is not much uniformity in the degree of proof of authenticity required by different courts. 1 Greenl. Ev. §§ 486–488.}

[3] Bristow *v.* Sequeville, 6 Ex. 275; Rowley *v.* L. & N. W. Rail-

The opinion of an expert as to the existence of the facts on which his opinion is to be given is irrelevant, unless he perceived them himself.[1]

Illustrations.

(*a*) The question is, whether the death of A was caused by poison. The opinions of experts as to the symptoms produced by the poison by which A is supposed to have died, are deemed to be relevant.[2]

(*b*) The question is, whether A, at the time of doing a certain act, was, by reason of unsoundness of mind, incapable of knowing the nature of the act, or that he was doing what was either wrong or contrary to law.

The opinions of experts upon the question whether the symptoms exhibited by A commonly show unsoundness of mind, and whether such unsoundness of mind usually renders persons incapable of

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way, L. R. 8 Ex. 221; In the Goods of Bonelli, L. R. 1 P. D. 69; {Com. *v.* Williams, 105 Mass. 62. So it is the duty of the courts to decide upon the existence of any preliminary fact or condition upon which the admissibility of any evidence depends: as whether a witness possesses sufficient mental capacity to be admissible, Coleman *v.* Com., 25 Va. 865; or a document comes from the proper custody, Doe *v.* Keeling, 11 Q. B. 889; or a dying declarant entertained hope of recovery, State *v.* Tilghman, 11 Ired. (N. C.) Law, 513; or whether a declaration is part of the *res gestæ*, State *v.* Pike, 51 N. H. 105; or whether a photograph of a portion of a defective highway is sufficiently verified, Blair *v.* Pelham, 118 Mass. 420; and the like. For further illustrations, see 1 Greenl. Ev. § 49; Taylor, Ev. § 21.

In determining the question of the existence of these conditions, whether the judge may receive and act upon evidence which would not in a trial be legally admissible, is still an open question. Beaufort *v.* Crawshay, 35 L. J. C. P. 332; s. c. 1 H. & R. 638. Best (Ev. vol. i. § 82) says that the better opinion is that he may; and this would seem to be the fair result of the English cases, though Taylor thinks it of doubtful legality, Ev. vol. i. § 479. We are not aware that the point has been solemnly adjudicated by any court of last resort in this country; and presume the practice varies, as it does in England. Such judgment is conclusive, unless upon a report of all the evidence it clearly appears that there was error. O'Connor *v.* Halinan, 103 Mass. 547.}

[1] 1 Ph. 507; T. E. s. 1278; {1 Greenl. Ev. § 440.}

[2] R. *v.* Palmer (*passim*). See my "Gen. View of Crim. Law," 357.

knowing the nature of the acts which they do, or of knowing that what they do is either wrong or contrary to law, are deemed to be relevant.[1]

(*c*) The question is, whether a certain document was written by A. Another document is produced which is proved or admitted to have been written by A.

The opinions of experts on the question whether the two documents were written by the same person or by different persons, are deemed to be relevant.[2]

(*d*) The opinions of experts on the questions, whether in illustration (*a*) A's death was in fact attended by certain symptoms; whether in illustration (*b*) the symptoms from which they infer that A was of unsound mind existed; whether in illustration (*c*) either or both of the documents were written by A, are deemed to be irrelevant.

ARTICLE 50.

FACTS BEARING UPON OPINIONS OF EXPERTS.

Facts, not otherwise relevant, are deemed to be relevant if they support or are inconsistent with the opinions of experts, when such opinions are deemed to be relevant.

{All facts are relevant which show that the statements of witnesses, whether experts or non-experts, of fact or of opinion, are or are not to be relied on.}

Illustrations.

(*a*) The question is, whether A was poisoned by a certain poison. The fact that other persons, who were poisoned by that poison,

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[1] R. *v.* Dove (*passim*). Gen. View Crim. Law, 891.

[2] 28 Vict. c. 18, s. 8. {This statute seems to have been passed to resolve the doubt whether such evidence was admissible, arising out of the differences of opinion of the judges in Doe *v.* Suckermore, 5 Ad. & El. 703. The same doubt exists on the differing opinions of different courts in this country; but the weight of opinion is perhaps in accordance with the English statute. 1 Greenl. Ev. § 579 *et seq.* On the trial of one physician for malpractice, another physician cannot be allowed to testify that in his opinion upon the facts proved there was no malpractice. In other words, the witness cannot give his opinion upon the existence or non-existence of the fact which the jury is to pass upon. Hoener *v.* Koch, Sup. Ct. Ill., 4 L. & Eq. Reptr. 173.}

exhibited certain symptoms which experts affirm or deny to be the symptoms of that poison, is deemed to be relevant.[1]

(*b*) The question is, whether an obstruction to a harbor is caused by a certain bank. An expert gives his opinion that it is not.

The fact that other harbors similarly situated in other respects, but where there were no such banks,[2] began to be obstructed at about the same time, is deemed to be relevant.

ARTICLE 51.

OPINION AS TO HANDWRITING, WHEN DEEMED TO BE RELEVANT.

When there is a question as to the person by whom any document was written or signed, the opinion of any person acquainted with the handwriting of the supposed writer that it was or was not written or signed by him, is deemed to be a relevant fact.

A person is deemed to be acquainted with the hand writing of another person when he has at any time seen that person write, or when he has received documents purporting to be written by that person in answer to documents written by himself or under his authority and addressed to that person, or when, in the ordinary course of business, documents purporting to be written by that person have been habitually submitted to him.[3]

Illustration.

The question is, whether a given letter is in the handwriting of A, a merchant in Calcutta.

B is a merchant in London, who has written letters addressed to A,

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[1] R. v. Palmer, printed trial, p. 124. &c. In this case (tried in 1856 evidence was given of the symptoms attending the deaths of Agnes Benet, poisoned by strychnine in 1845. Mrs. Serjeantson Smith, similarly poisoned in 1848. and Mrs. Dove, murdered by the same poison subsequently to the death of Cook, for whose murder Palmer was tried.

[2] Foulkes v. Chadd, 3 Doug. 157.

[3] See Illustrations; {1 Greenl. Ev. § 577.}

and received in answer letters purporting to be written by him. C is B's clerk, whose duty it was to examine and file B's correspondence. D is B's broker, to whom B habitually submitted the letter purporting to be written by A for the purpose of advising with him thereon.

The opinions of B, C, and D on the question whether the letter is in the handwriting of A are relevant, though neither B, C, nor D ever saw A write.[1]

The opinion of C, who saw A write once twenty years ago, is also relevant.[2]

ARTICLE 52.

COMPARISON OF HANDWRITINGS.

Comparison of a disputed handwriting with any writing proved to the satisfaction of the judge to be genuine is permitted to be made by witnesses, and such writings, and the evidence of witnesses respecting the same, may be submitted to the Court and jury as evidence of the genuineness or otherwise of the writing in dispute. This paragraph applies to all courts of judicature, criminal or civil, and to all persons having by law, or by consent of parties, authority to hear, receive, and examine evidence.[3]

ARTICLE 53.

OPINION AS TO EXISTENCE OF MARRIAGE, WHEN RELEVANT.

When there is a question whether two persons are or are not married, the facts that they cohabited and were treated by others as man and wife are deemed to be

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[1] Doe *v* Suckermore, 5 A. & E. 705 (Coleridge, J.); 730 (Patteson, J.); 739–740 (Denman, C. J.).

[2] R. *v.* Horne Tooke, 25 S. T. 71–72.

[3] 17 & 18 Vict. c. 125, s. 27; 28 Vict. c. 18, s. 8. {The American authorities differ upon the admissibility of a standard of comparison, proved to the satisfaction of the judge to be genuine, with a nearly equal weight *pro* and *con*. 1 Greenl. Ev. § 581. In Indiana, a paper not already in the cause, and foreign to it, with a proved genuine sig-

relevant facts, and to raise a presumption that they were lawfully married, and that any act necessary to the validity of any form of marriage which may have passed between them was done;[1] but such facts are not sufficient to prove a marriage in a prosecution for bigamy or in proceedings for a divorce, or in a petition for damages against an adulterer.[2]

ARTICLE 54.

GROUNDS OF OPINION, WHEN DEEMED TO BE RELEVANT.

Whenever the opinion of any living person is deemed

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nature, may be used by an expert upon which to state his opinion, but cannot be allowed to go to the jury to enable them to compare and form an opinion. Huston *v.* Schindler, 46 Ind. 39. And this seems to be the rule in Illinois. Brobston *v.* Cahill, 64 Ill. 356.}

[1] {1 Greenl. Ev. § 107; 2 id. § 462.}

[2] Morris *v.* Miller, 2 Burr. 2057; Birt *v.* Barlow, 1 Doug. 170; and see Catherwood *v.* Caslon, 13 Mow. 261. Compare R. *v.* Mainwaring, Dear. & B. 132. See, too, De Thoren *v.* A. G., L. R. 1 App. Cas. 686; Piers *v.* Piers, 2 H. & C. 331. Some of the references in the report of De Thoren *v.* A. G. are incorrect. This article was not expressed strongly enough in the former editions. {Where the question of marriage arises on an issue involving a finding that one party or the other has been guilty of a crime, it certainly has been the rule in this country to require direct evidence of the marriage, and that in such a case the marriage cannot be proved by inferences from circumstances alone. Hutchins *v.* Kennel, 31 Mich. 126; 1 Bish. M. & D. c. 23–29. But that any particular kind of evidence should be required is contrary to principle. The American rule is, by a very great preponderance of authority, that when in a civil suit a charge of criminality is to be proved, as part of the case, it may be proved by a preponderance of evidence only. 10 Am. Law Rev. N. S. 642. Massachusetts, California, and perhaps other States, have by statute defined what evidence shall be proof of marriage generally or in special cases, showing a disposition to break away from the rule requiring one kind of evidence of the same facts in one case, and another in another. See also, to the same effect, Young *v.* Foster, 14 N. H. 114.}

to be relevant, the grounds on which such opinion is based are also deemed to be relevant.

Illustration.

An expert may give an account of experiments performed by him for the purpose of forming his opinion.

CHAPTER VI.*

CHARACTER, WHEN DEEMED TO BE RELEVANT AND WHEN NOT.

ARTICLE 55.

CHARACTER GENERALLY IRRELEVANT.

THE fact that a person is of a particular character is deemed to be irrelevant to any inquiry respecting his conduct, except in the cases mentioned in this chapter.

{1 Greenl. Ev. §§ 54, 55.}

ARTICLE 56.

EVIDENCE OF CHARACTER IN CRIMINAL CASES.

In criminal proceedings, the fact that the person accused has a good character,[1] is deemed to be relevant; but the fact that he has a bad character is deemed to be irrelevant, unless it is itself a fact in issue, or unless evidence has been given that he has a good character, in which case evidence that he has a bad character is admissible.[2]

When any person gives evidence of his good character who —

Being on his trial for any felony not punishable with death, has been previously convicted of felony;[3]

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* See Appendix, Note XXV.

[1] {This is true as well when the evidence of the criminal act is direct as when it is circumstantial. Stone *v.* People, 56 N. Y. 315.}

[2] {3 Greenl. Ev. § 25 *et seq.* Where the jury impose the fine, good or bad character seems to be relevant. Rosenbaum *v.* State, 33 Ala. 354.}

[3] 7 & 8 Geo. IV. c. 28, s. 11, amended by 6 & 7 Will. IV. c. 111. If

Or who, being upon his trial for any offence punishable under the Larceny Act, 1861, has been previously convicted of any felony, misdemeanor, or offence punishable upon summary conviction;[1]

Or who, being upon his trial for any offence against the Coinage Offences Act, 1861, or any former Act relating to the coin, has been previously convicted of any offence against any such Act.[2]

The prosecutor may, in answer to such evidence of good character, give evidence of any such previous conviction before the jury return their verdict for the offence for which the offender is being tried.[3]

In this article the word "character" means reputation as distinguished from disposition, and evidence may be given only of general reputation and not of particular acts by which reputation or disposition is shown.[4]

ARTICLE 57.

CHARACTER AS AFFECTING DAMAGES.

In civil cases, the fact that the character of any party to the action is such as to affect the amount of damages which he ought to receive, is generally deemed to be irrelevant.[5]

"not punishable with death" means not so punishable at the time when 7 & 8 Geo. IV. c. 28, was passed (21 June, 1827), this narrows the effect of the article considerably.

[1] 24 & 25 Vict. c. 96, s. 116.

[2] 24 & 25 Vict. c. 99, s. 37.

[3] See each of the Acts above referred to.

[4] R. *v.* Rowton, 1 L. & C. 520; {1 Greenl. Ev. § 55, and note 3; id. § 25 *et seq.*}

[5] In 1 Ph. Ev. 504, &c., and T. E. s. 333, all the cases are referred to. The most important are —— *v.* Moor, 1 M. & S. 284, which treats the evidence as admissible, though perhaps it does not absolutely affirm the proposition that it is so; and Jones *v.* Stevens, 11 Price, 235, see especially pp. 265, 268, which decides that it is not.

The question is now rendered comparatively unimportant, as the object for which such evidence used to be tendered can always be obtained by cross-examining the plaintiff to his credit. {Taylor, Ev. § 833, cited by the author, thinks the weight of authority is that such evidence is admissible. But the authorities are so equally balanced, that difference of opinion is not surprising. The American authorities are as irreconcilable. 2 Greenl. Ev. § 275.}

PART II.

ON PROOF.

CHAPTER VII.

FACTS PROVED OTHERWISE THAN BY EVIDENCE—JUDICIAL NOTICE.

ARTICLE 58.*

OF WHAT FACTS THE COURT TAKES JUDICIAL NOTICE.

IT is the duty of all judges to take judicial notice of the following facts:—

(1) All unwritten laws, rules, and principles having the force of law administered by any Court sitting under the authority of Her Majesty and her successors in England or Ireland, whatever may be the nature of the jurisdiction thereof.[1]

(2) All public Acts of Parliament,[1] and all Acts of Parliament whatever, passed since February 4, 1851, unless the contrary is expressly provided in any such Act.[2]

(3) The general course of proceeding and privileges of Parliament and of each House thereof, and the date and place of their sittings, but not transactions in their journals.[3]

(4) All general customs which have been held to have

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* See Appendix, Note XXVI.

[1] Ph. Ev. 460–461; T. E. s. 4, and see 36 & 37 Vict. c. 66 (Judicature Act of 1873), s. 25.

[2] 13 & 14 Vict. c. 21, ss. 7, 8, and see (for date) caption of session of 14 & 15 Vict.

[3] Ph. Ev. 460; T. E. s. 5.

the force of law in any division of the High Court of Justice or by any of the superior courts of law or equity, and all customs which have been duly certified to and recorded in any such court.[1]

(5) The course of proceeding and all rules of practice in force in the Supreme Court of Justice. Courts of a limited or inferior jurisdiction take judicial notice of their own course of procedure and rules of practice, but not of those of other courts of the same kind, nor does the Supreme Court of Justice take judicial notice of the course of procedure and rules of practice of such Courts.[2]

(6) The accession and [*semble*] the sign manual of Her Majesty and her successors.[3]

(7) The existence and title of every State and Sovereign recognized by Her Majesty and her successors.[4]

(8) The accession to office, names, titles, functions, and, when attached to any decree, order, certificate, or other judicial or official documents, the signatures, of all the judges of the Supreme Court of Justice.[5]

(9) The Great Seal, the Privy Seal, the seals of the Superior Courts of Justice,[6] and all seals which any Court

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[1] The old rule was that each Court took notice of customs held by or certified to it to have the force of law. It is submitted that the effect of the Judicature Act, which fuses all the Courts together, must be to produce the result stated in the text. As to the old law, see Piper *v.* Chappell, 14 M. & W. 649–650. *Ex parte* Powell, *In re* Matthews, L. R. 1 Ch. Div. 505–507, contains some remarks by Lord Justice Mellish, as to proving customs till they come by degrees to be judicially noticed.

[2] 1 Ph. Ev. 462–463; T. E. s. 19.

[3] 1 Ph. Ev. 458; T. E. ss. 16, 12.

[4] 1 Ph. Ev. 460; T. E. s. 3.

[5] 1 Ph. 462; T. E. 19; and as to latter part, 8 & 9 Vict. c. 113, s. 2, as modified by 36 & 37 Vict. c. 66, s. 76 (Judicature Act of 1873).

[6] The Judicature Acts confer no seal on the Supreme or High Court or its divisions.

is authorized to use by any Act of Parliament,[1] certain other seals mentioned in Acts of Parliament,[1] the seal of the Corporation of London,[2] and the seal of any notary public in the Queen's dominions.[3]

(10) The extent of the territories under the dominion of Her Majesty and her successors; the territorial and political divisions of England and Ireland, but not their geographical position or the situation of particular places; the commencement, continuance, and termination of war between Her Majesty and any other Sovereign; and all other public matters directly concerning the general government of Her Majesty's dominions.[4]

(11) The ordinary course of nature, natural and artificial divisions of time, the meaning of English words.[5]

(12) All other matters which they are directed by any statute to notice.[6]

{Courts will generally take notice of whatever ought to be generally known within their jurisdiction. But different judges take different views of the scope of this rule, and the result is some confusion, and not unfrequently considerable latitude in its application. 1 Greenl. Ev. §§ 4–6, 479 *et seq.* and notes. This article applies to the courts of the United States and of the several States, merely substituting for the titles which have a local application the corresponding ones for the several governments.}

ARTICLE 59.

AS TO PROOF OF SUCH FACTS.

No evidence of any fact of which the Court will take judicial notice need be given by the party alleging its

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[1] Doe *v.* Edwards, 9 A. & E. 555. See a list in T. E. s. 6.

[2] 1 Ph. Ev. 464; T. E. s. 6.

[3] Cole *v.* Sherard, 11 Ex. 482. As to foreign notaries, see Earl's Trust, 4 K. & J. 300.

[4] 1 Ph. Ev. 458, 460, 466; and T. E. ss. 15–16.

[5] 1 Ph. Ev. 465–466; T. E. s. 14; {1 Greenl. Ev. §§ 4–6.}

[6] *E.g.*, the Articles of War. See sec. 1 of the Mutiny Act.

existence; but the judge, upon being called upon to take judicial notice thereof, may, if he is unacquainted with such fact, refer to any person or to any document or book of reference for his satisfaction in relation thereto, or may refuse to take judicial notice thereof unless and until the party calling upon him to take such notice produces any such document or book of reference.[1]

ARTICLE 60.

EVIDENCE NEED NOT BE GIVEN OF FACTS ADMITTED.

No fact need be proved in any proceeding which the parties thereto or their agents agree to admit at the hearing, or which they have admitted before the hearing and with reference thereto, or by their pleadings.[2] Provided that in a trial for felony the prisoner can make no admissions so as to dispense with proof, though a confession

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[1] T. E. (from Greenleaf) s. 20. *E.g.*, a judge will refer in case of need to an almanac, or to a printed copy of the statutes, or write to the Foreign Office, to know whether a State had been recognized. {In a case where a judge ought to take judicial notice, he may inform himself very much at his discretion. United States *v.* Teschmaker, 22 How. (U. S.) 392; Wagner's Case, 61 Me. 178. It is said he is not to resort to local history; but he is to determine what is local and what is general. McKenna *v.* Bliss, 21 N. Y. 296. He will go to an almanac for a date, Page *v.* Faucet, Cro. Eliz. 227; to the dictionary for the meaning of a word, Clementi *v.* Golding 2 Camp. 25; to the printed or enrolled statute, on a question of construction, Rex *v.* Jeffries, 1 Stra. 446; Spring *v.* Eve, 2 Mod. 240; to officials, for the law and practice in their departments, Taylor *v.* Barclay, 2 Sim. 221; Chandler *v.* Grieves, 2 H. Bl. 606, note *a*; Doe *v.* Lloyd, 1 M. & Gr. 685; or to a member of the bar on a question of practice in his profession, Willoughby *v.* Willoughby, 1 T. R. 772.}

[2] See Schedule to Judicature Act of 1875, Order xxxii.; {1 Greenl. Ev. §§ 27, 187.}

may be proved as against him, subject to the rules stated in articles 21–24.[1]

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[1] 1 Ph. Ev. 391, n. 6. In R. *v.* Thornhill, 8 C. & P., Lord Abinger acted upon this rule in a trial for perjury. {The practice in this country is understood to be generally, if not universally, the other way, and admissions of the prisoner are constantly received by the courts.}

CHAPTER VIII.

OF ORAL EVIDENCE.

ARTICLE 61.

PROOF OF FACTS BY ORAL EVIDENCE.

ALL facts may be proved by oral evidence subject to the provisions as to the proof of documents contained in Chapters IX., X., XI., and XII.

ARTICLE 62.*

ORAL EVIDENCE MUST BE DIRECT.

Oral evidence must in all cases whatever be direct; that is to say —

If it refers to a fact alleged to have been seen, it must be the evidence of a witness who says he saw it;

If it refers to a fact alleged to have been heard, it must be the evidence of a witness who says he heard it;

If it refers to a fact alleged to have been perceived by any other sense or in any other manner, it must be the evidence of a witness who says he perceived it by that sense or in that manner;

If it refers to an opinion, or to the grounds on which that opinion is held, it must be the evidence of the person who holds that opinion on those grounds.

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* See Appendix, Note XXVII.

CHAPTER IX.*

OF DOCUMENTARY EVIDENCE—PRIMARY AND SECONDARY, AND ATTESTED DOCUMENTS.

ARTICLE 63.

PROOF OF CONTENTS OF DOCUMENTS.

THE contents of documents may be proved either by primary or by secondary evidence.

ARTICLE 64.

PRIMARY EVIDENCE.

Primary evidence means the document itself produced for the inspection of the Court, accompanied by the production of an attesting witness in cases in which an attesting witness must be called under the provisions of articles 66 and 67; or an admission of its contents proved to have been made by a person whose admissions are relevant under articles 15–20.[1]

Where a document is executed in several parts, each part is primary evidence of the document:

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* The articles in this chapter have been rearranged so as to make those relating to attested documents form part of the articles on primary evidence. This is clearly the proper order, as was pointed out by a critic to whom I am much indebted.

[1] Slatterie *v.* Pooley, 6 M. & W. 664. {The proof of the contents of a writing, by the admission of the party, is allowed in Massachusetts. But in New York and in the Irish Courts, such proof is rejected. 1 Greenl. Ev. §§ 96, 203. Deeds in duplicate, executed by all the parties, are all originals. Colling *v.* Trewick, 6 B. & C. 398; Brown *v.* Woodman, 6 C. & P. 206.}

Where a document is executed in counterpart, each counterpart being executed by one or some of the parties only, each counterpart is primary evidence as against the parties executing it.[1]

Where a number of documents are all made by printing, lithography, or photography, or any other process of such a nature as in itself to secure uniformity in the copies, each is primary evidence of the contents of the rest;[2] but where they are all copies of a common original, no one of them is primary evidence of the contents of the original.[3]

ARTICLE 65.

PROOF OF DOCUMENTS BY PRIMARY EVIDENCE.

The contents of documents must, except in the cases mentioned in article 71, be proved by primary evidence; and in the cases mentioned in article 66 by calling an attesting witness.

ARTICLE 66.*

PROOF OF EXECUTION OF DOCUMENT REQUIRED BY LAW TO BE ATTESTED.

If a document is required by law to be attested, it may not be used as evidence (except in the cases mentioned or

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* See Appendix, Note XXVIII.

[1] Roe *d.* West *v.* Davis, 7 Ea. 362.

[2] R. *v.* Watson, 2 Star. 129. This case was decided long before the invention of photography; but the judgments delivered by the Court (Ellenborough, C. J., and Abbott, Bayley and Holroyd, JJ.) established the principle stated in the text.

[3] Noden *v.* Murray, 3 Camp. 224. {A duplicate notarial instrument, made from the copy in the book, is an original. Geralopulo *v.* Wieler, 10 C. B. 712. Whether a broker's entries in his book, or the bought and sold notes which he issues, are the proper primary evidence, is not agreed. Sievewright *v.* Archibald, 17 Q. B. 115, holds the former to be, while Durell *v.* Evans, 1 H. & C. 174, holds that the latter are.}

referred to in the next article) if there be an attesting witness alive, sane, and subject to the process of the Court, until one attesting witness at least has been called for the purpose of proving its execution.

{1 Greenl. Ev. § 569. This rule is not abrogated by the change in the law making parties witnesses. Whyman *v.* Garth, 8 Ex. 803; Brigham *v.* Palmer, 3 Allen (Mass.), 450. But it has been modified by statutes in some of the States. See 1 Greenl. Ev. § 569, and notes.}

If it is shown that no such attesting witness is alive or can be found, it must be proved that the attestation of one attesting witness at least is in his handwriting, and that the signature of the person executing the document is in the handwriting of that person.

The rule extends to cases in which —

the document has been burnt[1] or cancelled;[2]

the subscribing witness is blind;[3]

the person by whom the document was executed is prepared to testify to his own execution of it;[4]

the person seeking to prove the document is prepared to prove an admission of its execution by the person who executed it, even if he is a party to the cause,[5] unless such admission be made for the purpose of, or has reference to, the cause.

ARTICLE 67.*

CASES IN WHICH ATTESTING WITNESS NEED NOT BE CALLED.

In the following cases, and in the case mentioned in article 88, but in no others, a person seeking to prove the

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* See Appendix, Note XXVIII.

[1] Gillies *v.* Smither, 2 Star. R. 528.

[2] Breton *v.* Cope, Pea. R. 43. [3] Cronk *v.* Frith, 9 C. & P. 197.

[4] R. *v.* Harringworth, 4 M. & S. 353; {Barry *v.* Ryan, 4 Gray (Mass.), 523.}

[5] Call *v.* Dunning, 4 Ea. 53. See, too, Whyman *v.* Garth, 8 Ex.

execution of a document required by law to be attested is not bound to call for that purpose either the party who executed the deed or any attesting witness, or to prove the handwriting of any such party or attesting witness—

(1) When he is entitled to give secondary evidence of the contents of the document under article 71 (*a*);[1]

(2) When his opponent produces it when called upon and claims an interest under it in reference to the subject-matter of the suit;[2]

(3) When the person against whom the document is sought to be proved is a public officer bound by law to procure its due execution, and who has dealt with it as a document duly executed.[3]

{(4) In this country, it has been held that official bonds, required by law to be taken, as in the case of an executor's, may be proved without calling in the attesting witnesses. Kello *v.* Maget, 1 Dev. & Bat. 414. So when the instrument is not directly in issue, but comes in incidentally, as where A sues B on a parol contract to do a portion of the work which A had, in an attested writing, agreed with C to do. Curtis *v.* Belknap, 6 Wash. (Vt.) 433. So, *it seems*, on an indictment for obtaining a signature to a deed by false pretences, the deed and signature may be proved without calling the attesting witnesses. Com. *v.* Castles, 9 Gray (Mass.), 123.}

803; Randall *v.* Lynch, 2 Camp. 357; {Henry *v.* Bishop, 2 Wend. (N. Y.) 575; Jones *v.* Phelps, 5 Mich. 218.}

[1] Cooper *v.* Tamswell, 8 Tau. 450; Poole *v.* Warren, 8 A. & E. 588.

[2] Pearce *v.* Hooper, 3 Tau. 60; Rearden *v.* Minter, 5 M. & G. 204; {1 Greenl. Ev. § 571.} As to the sort of interest necessary to bring a case within this exception, see Collins *v.* Bayntun, 1 Q. B. 118.

[3] Plumer *v.* Brisco, 11 Q. B. 46. Bailey *v.* Bidwell, 13 M. & W. 73, would perhaps justify a slight enlargement of the exception, but the circumstances of the case were very peculiar. Mr. Taylor (ss. 1650–1651) considers it doubtful whether the rule extends to instruments executed by corporations, or to deeds enrolled under the provisions of any Act of Parliament, but his authorities hardly seem to support his view; at all events, as to deeds by corporations. {1 Greenl. Ev. § 571.}

ARTICLE 68.

PROOF WHEN ATTESTING WITNESS DENIES THE EXECUTION.

If the attesting witness denies or does not recollect the execution of the document, its execution may be proved by other evidence.[1]

ARTICLE 69.

PROOF OF DOCUMENT NOT REQUIRED BY LAW TO BE ATTESTED.

An attested document not required by law to be attested may in all cases whatever, civil or criminal, be proved as if it was unattested.[2]

ARTICLE 70.

SECONDARY EVIDENCE.

Secondary evidence means—

(1) Examined copies, exemplifications, office copies, and certified copies:[3]

(2) Other copies made from the original and proved to be correct:

(3) Counterparts of documents as against the parties who did not execute them:[4]

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[1] "Where an attesting witness has denied all knowledge of the matter, the case stands as if there were no attesting witness." Talbot *v.* Hodson, 7 Tau. 251, 254; {1 Greenl. Ev. § 572, n. 8.}

[2] 17 & 18 Vict. c. 125, s. 26; 28 & 29 Vict. c. 18, ss. 1, 7. {By the common law, such documents must be proved in the same way as those which the law requires to be attested. Such is, no doubt, the rule, in the absence of statutory control, in this country.}

[3] See chapter X.

[4] Munn *v.* Godbold, 3 Bing. 292.

(4) Oral accounts of the contents of a document given by some person who has himself seen it.

{1 Greenl. Ev. §§ 84 *et seq.*}

ARTICLE 71.

CASES IN WHICH SECONDARY EVIDENCE RELATING TO DOCUMENTS MAY BE GIVEN.

Secondary evidence may be given of the contents of a document in the following cases—

(*a*) When the original is shown or appears to be in the possession or power of the adverse party,

and when, after the notice mentioned in article 72, he does not produce it;[1]

(*b*) When the original is shown or appears to be in the possession or power of a stranger not legally bound to produce it, and who refuses to produce it after being served with a *subpœna duces tecum*, or after having been sworn as a witness and asked for the document and having admitted that it is in court;[2]

(*c*) When the original has been destroyed or lost, and proper search has been made for it;[3]

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[1] R. *v.* Watson, 2 T. R. 201. Entick *v.* Carrington, 19 S. T. 1078, is cited by Mr. Phillips as an authority for this proposition. I do not think it supports it, but it shows the necessity for the rule, as at common law no power existed to compel the production of documents. {By statute, the United States courts have the power to compel parties to produce papers, under penalty of nonsuit or default. 1 Greenl. Ev. § 559, note 3. And the courts of some of the States have exercised the same power. Ibid. § 560, note.}

[2] Miles *v.* Oddy, 6 C. & P. 732; Marston *v.* Downes, 1 A. & E. 31; {1 Greenl. Ev. § 558. In this country, the court, in its discretion, will compel the production of the papers. Bull *v.* Loveland, 10 Pick. (Mass.) 14.}

[3] 1 Ph. Ev. s. 452; 2 Ph. Ev. 281; T. E. (from Greenleaf) s. 399; {1 Greenl. Ev. § 558} The loss may be proved by an admission of the party or his attorney. R. *v.* Haworth, 4 C. & P. 254.

(*d*) When the original is of such a nature as not to be easily movable,[1] or is in a country from which it is not permitted to be removed;[2]

(*e*) When the original is a public document;[3]

(*f*) When the document is an entry in a banker's book proof of which is admissible under article 36.

(*g*) When the original is a document for the proof of which special provision is made by any Act of Parliament, or any law in force for the time being;[4] or

(*h*) When the originals consist of numerous documents which cannot conveniently be examined in court, and the fact to be proved is the general result of the whole collection: provided that that result is capable of being ascertained by calculation.[5]

Subject to the provisions hereinafter contained any secondary evidence of a document is admissible.[6]

In case (*f*) the entries may be proved by copies verified by means of the affidavit of a person who has examined the same, stating the fact of said examination, and that the copies sought to be put in evidence are correct [? in addition to the affidavit mentioned in article

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[1] Mortimer *v.* McCallan, 6 M. & W. 67, 68 (this was the case of a libel written on a wall); Bruce *v.* Nicolopulo, 11 Ex. 133 (the case of a placard posted on a wall); {1 Greenl. Ev. § 94.}

[2] Alivon *v.* Furnival, 1 C. M. & R. 277, 291-292. {Or beyond the jurisdiction of the court. Burton *v.* Driggs, 20 Wall. (U. S.) 125.}

[3] See chapter X.; {1 Greenl. Ev. § 91.}

[4] Ibid. {Items (*f*) and (*g*) are founded on the English statutes, and not on the common law.}

[5] Roberts *v.* Doxen, Peake, 116; Meyer *v.* Sefton, 2 Star. 276; {1 Greenl. Ev. § 93.} The books, &c., should in such a case be ready to be produced if required. Johnson *v.* Kershaw, 1 De G. & S. 264.

[6] If a counterpart is known to exist, it is the safest course to produce or account for it. Munn *v.* Godbold, 3 Bing. 297; R. *v.* Castleton, 7 T. R. 236.

36, and subject to the provisions contained in articles 37 and 38 [1]].

In case (*g*) evidence may be given as to the general result of the documents by any person who has examined them, and who is skilled in the examination of such documents.

Questions as to the existence of facts rendering secondary evidence of the contents of documents admissible are to be decided by the judge,[2] unless in deciding such a question the judge would in effect decide the matter in issue.

ARTICLE 72.*

RULES AS TO NOTICE TO PRODUCE.

Secondary evidence of the contents of the documents referred to in article 71 (*a*), may not be given unless the party proposing to give such secondary evidence has,

if the original is in the possession or under the control of the adverse party, given him such notice to produce it as the Court regards as reasonably sufficient to enable it to be procured ; [3] or has,

if the original is in the possession of a stranger to the action, served him with a *subpœna duces tecum* requiring its production ; [4]

if a stranger so served does not produce the document, and has no lawful justification for refusing or omitting to do so, his omission does not entitle the party who served

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* See Appendix, Note XXIX.

[1] I suppose this is the effect of 39 & 40 Vict. c. 48, ss. 4 and 3, but the Act is oddly arranged and expressed. There are several small peculiarities in its wording.

[2] Stowe *v.* Querner, L. R. 5 Exch. 155 ; {*ante*, art. 49.}

[3] Dwyer *v.* Collins, 7 Ex. 648 ; {1 Greenl. Ev. § 560.}

[4] Newton *v.* Chaplin, 10 C. B. 56–69 ; {1 Greenl. Ev. § 558.}

him with the *subpœna* to give secondary evidence of the contents of the document.[1]

Such notice is not required in order to render secondary evidence admissible in any of the following cases—

(1) When the document to be proved is itself a notice;

(2) When the action is founded upon the assumption that the document is in the possession or power of the adverse party and requires its production;[2]

(3) When it appears or is proved that the adverse party has obtained possession of the original from a person subpœnaed to produce it;[3]

(4) When the adverse party or his agent has the original in court.[4]

{(5) Notice to produce is not necessary when the instrument to be proved and that to be produced are duplicate originals, 1 Greenl. Ev. § 561; nor when the party has fraudulently or forcibly obtained possession of it, for the purpose of preventing its production, Doe *v.* Ries, 7 Bing. 724; nor when the party has purposely evaded the service of the notice, Bright *v.* Pennywit, 21 Ark. 130; nor when the paper is in possession of a person who cannot be reached by the process of the court, Shepard *v.* Giddings, 22 Conn. 282; nor when the paper is proved to be lost, McCreary *v.* Hood, 5 Blackf. (Ind.) 316.}

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[1] R. *v.* Llanfaethly, 2 E. & B. 940. {This case seems to have been *obiter*, Earl, J., distinctly saying that the notice to produce had not been served upon the right person. However this may be, we think that in this country the court would either compel the witness to produce (he not being justified in withholding it), or allow secondary evidence. Bull *v.* Loveland, 10 Pick. (Mass.) 14.}

[2] How *v.* Hall, 14 Ea. 247. In an action on a bond, no notice to produce the bond is required. See other illustrations in 2 Ph. Ev. 373; T. E. s. 422; {1 Greenl. Ev. § 561.}

[3] Leeds *v.* Cook, 4 Esp. 256.

[4] Formerly doubted, see 2 Ph. Ev. 278, but so held in Dwyer *v.* Collins, 7 Ex. 639; {Brandt *v.* Klein, 17 Johns. (N. Y.) 335; Rhoades *v.* Selin, 4 Wash. C. Ct. 718; Dana *v.* Boyd, 2 J. J. Marsh. (Ky.) 587.}

CHAPTER X.

PROOF OF PUBLIC DOCUMENTS.

ARTICLE 73.

PROOF OF PUBLIC DOCUMENTS.

WHEN a statement made in any public document, register, or record, judicial or otherwise, or in any pleading or deposition kept therewith is in issue, or is relevant to the issue in any proceeding, the fact that that statement is contained in that document, may be proved in any of the ways mentioned in this chapter.[1]

ARTICLE 74.

PRODUCTION OF DOCUMENT ITSELF.

The contents of any public document whatever may be proved by producing the document itself for inspection from proper custody, and identifying it as being what it professes to be.

ARTICLE 75.*

EXAMINED COPIES.

The contents of any public document whatever may in all cases be proved by an examined copy.

{1 Greenl. Ev. § 508.}

An examined copy is a copy proved by oral evidence

* See Appendix, Note XXX., also Doe v. Ross, 7 M. & W. 106.

[1] See articles 36 and 90.

to have been examined with the original and to correspond therewith. The examination may be made either by one person reading both the original and the copy, or by two persons, one reading the original and the other the copy, and it is not necessary (except in peerage cases[1]), that each should alternately read both.[2]

ARTICLE 76.

GENERAL RECORDS OF THE REALM.

Any record under the charge and superintendence of the Master of the Rolls for the time being, may be proved by a copy certified as a true and authentic copy by the deputy keeper of the records or one of the assistant record keepers, and purporting to be sealed or stamped with the seal of the Record Office.[3]

ARTICLE 77.*

EXEMPLIFICATIONS.

An exemplification is a copy of a record set out either under the Great Seal or under the Seal of a Court.

A copy made by an officer of the Court, bound by law

See Appendix, Note XXXI.

[1] Slane Peerage Case, 5 C. & F. 42.

[2] 2 Ph. Ev. 200, 231; T. E. ss. 1379, 1389; R. N. P. 113; {1 Greenl. Ev. § 508.}

[3] 1 & 2 Vict. c. 94, ss. 1, 12, 13. {The mode of proof of public documents is so much a matter of statute regulation, both in England and in the different jurisdictions of this country, that the details of differences would hardly be in their proper place in this work. So far as the production and proof of such documents is regulated by the common law, or by general practice, or by special statutes, reference is made to Mr. Greenleaf's chapter on the subject. 1 Greenl. Ev. § 499 *et seq.*}

to make it, is equivalent to an exemplification, though it is sometimes called an office copy.

An exemplification is equivalent to the original document exemplified.

{1 Greenl. Ev. § 501.}

ARTICLE 78.*

COPIES EQUIVALENT TO EXEMPLIFICATIONS.

A copy made by an officer of the Court, who is authorized to make it by a rule of Court, but not required by law to make it, is regarded as equivalent to an exemplification in the same Cause and Court, but in other Causes or Courts it is not admissible unless it can be proved as an examined copy.

ARTICLE 79.

CERTIFIED COPIES.

It is provided by many statutes that various certificates, official and public documents, documents and proceedings of corporations, and of joint-stock and other companies, and certified copies of documents, bye-laws, entries in registers and other books, shall be receivable in evidence of certain particulars in Courts of Justice, provided they are respectively authenticated in the manner prescribed by such statutes.[1]

Whenever, by virtue of any such provision, any such certificate or certified copy as aforesaid is receivable in proof of any particular in any Court of Justice, it is admissible as evidence if it purports to be authenticated in the manner prescribed by law without proof of any

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* See Appendix, Note XXXI.

[1] 8 & 9 Vict. c. 113, preamble. Many such statutes are specified in T. E. s. 1440 and following sections. See, too, R. N. P. 114–115.

stamp, seal, or signature required for its authentication or of the official character of the person who appears to have signed it.[1]

Whenever any book or other document is of such a public nature as to be admissible in evidence on its mere production from the proper custody, and no statute exists which renders its contents provable by means of a copy, any copy thereof or extract therefrom is admissible in proof of its contents,[2] provided it purport to be signed and certified as a true copy or extract by the officer to whose custody the original is intrusted. Every such officer must furnish such certified copy or extract to any person applying at a reasonable time for the same, upon payment of a reasonable sum for the same, not exceeding fourpence for every folio of ninety words.[3]

ARTICLE 80.

DOCUMENTS ADMISSIBLE THROUGHOUT THE QUEEN'S DOMINIONS.

If by any law in force for the time being any document is admissible in evidence of any particular either in Courts of Justice in England and Wales, or in Courts of Justice in Ireland, without proof of the seal, or stamp, or

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[1] 8 & 9 Vict. c. 113, s. 1. I believe the above to be the effect of the provision, but the language is greatly condensed. Some words at the end of the section are regarded as unmeaning by several text writers. See, *e.g.*, R. N. P. 116; 2 Ph. Ev. 241; T. E. s. 7, note 1. Mr. Taylor says that the concluding words of the section were introduced into the Act while passing through the House of Commons. He adds, they appear to have been copied from 1 & 2 Vict. c. 94, s. 13 (see art. 76) "by some honorable member who did not know distinctly what he was about." They certainly add nothing to the sense.

[2] The words "provided it be proved to be an examined copy or extract, or," occur in the Act, but are here omitted, because their effect is given in article 75.

[3] 14 & 15 Vict. c. 99, s. 14.

signature authenticating the same, or of the judicial or official character of the person appearing to have signed the same, that document is also admissible in evidence to the same extent and for the same purpose, without such proof as aforesaid, in any Court or before any judge in any part of the Queen's dominions except Scotland.[1]

ARTICLE 81.

QUEEN'S PRINTERS' COPIES.

The contents of Acts of Parliament, not being public Acts, may be proved by copies thereof purporting to be printed by the Queen's printers;

The journals of either House of Parliament; and

Royal proclamations,

may be proved by copies thereof purporting to be printed by the printers to the Crown or by the printers to either House of Parliament.[2]

ARTICLE 82.

PROOF OF IRISH STATUTES.

The copy of the statutes of the kingdom of Ireland enacted by the Parliament of the same prior to the union of the kingdoms of Great Britain and Ireland,

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[1] Consolidates 14 & 15 Vict. c. 99, ss. 9, 10, 11, 19. Sec. 9 provides that documents admissible in England shall be admissible in Ireland; sec. 10 is the converse of 9; sec. 11 enacts that documents admissible in either shall be admissible in the "British Colonies;" and sec. 19 defines the British Colonies as including India, the Channel Islands, the Isle of Man, and "all other possessions" of the British Crown, wheresoever and whatsoever. This cannot mean to include Scotland, though the literal sense of the words would perhaps extend to it.

[2] 8 & 9 Vict. c. 113, s. 3. Is there any difference between the Queen's printers and the printers to the Crown?

and printed and published by the printer duly authorized by King George III. or any of his predecessors, is conclusive evidence of the contents of such statutes.[1]

ARTICLE 83.

PROCLAMATIONS, ORDERS IN COUNCIL, ETC.

The contents of any proclamation, order, or regulation issued at any time by Her Majesty or by the Privy Council, and of any proclamation, order, or regulation issued at any time by or under the authority of any such department of the Government or officer as is mentioned in the first column of the note [2] hereto, may be proved in all or any of the modes hereinafter mentioned; that is to say—

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[1] 41 Geo. III. c. 90, s. 9.

[2]

COLUMN 1. *Name of Department or Officer.*	COLUMN 2. *Names of Certifying Officers.*
The Commissioners of the Treasury.	Any Commissioner, Secretary, or Assistant Secretary of the Treasury.
The Commissioners for executing the Office of Lord High Admiral.	Any of the Commissioners for executing the Office of Lord High Admiral or either of the Secretaries to the said Commissioners.
Secretaries of State.	Any Secretary or Under Secretary of State.
Committee of Privy Council for Trade.	Any Member of the Committee of Privy Council for Trade or any Secretary or Assistant Secretary of the said Committee.
The Poor Law Board.	Any Commissioner of the Poor Law Board or any Secretary or Assistant Secretary of the said Board.
The Postmaster General.	Any Secretary or Assistant Secretary of the Post Office (33 & 34 Vict. c. 79, s. 21).

(Schedule to 31 & 32 Vict. c. 37. See also 34 & 35 Vict. c. 70, s. 5.)

(1) By the production of a copy of the Gazette purporting to contain such proclamation, order, or regulation:

(2) By the production of a copy of such proclamation, order, or regulation purporting to be printed by the Government printer, or, where the question arises in a Court in any British colony or possession, of a copy purporting to be printed under the authority of the legislature of such British colony or possession:

(3) By the production, in the case of any proclamation, order, or regulation issued by Her Majesty or by the Privy Council, of a copy or extract purporting to be certified to be true by the Clerk of the Privy Council or by any one of the Lords or others of the Privy Council, and, in the case of any proclamation, order, or regulation issued by or under the authority of any of the said departments or officers, by the production of a copy or extract purporting to be certified to be true by the person or persons specified in the second column of the said note in connection with such department or officer.

Any copy or extract made under this provision may be in print or in writing, or partly in print and partly in writing.

No proof is required of the handwriting or official position of any person certifying, in pursuance of this provision, to the truth of any copy of or extract from any proclamation, order, or regulation.[1]

Subject to any law that may be from time to time made by the legislature of any British colony or possession, this provision is in force in every such colony and possession.[2]

ARTICLE 84.

FOREIGN AND COLONIAL ACTS OF STATE, JUDGMENTS, ETC.

All proclamations, treaties, and other acts of State of any foreign State, or of any British colony, and all judg-

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[1] 31 & 32 Vict. c. 37, s. 2. [2] Ibid., s. 3.

ments, decrees, orders, and other judicial proceedings of any Court of Justice in any foreign State or in any British colony, and all affidavits, pleadings, and other legal documents filed or deposited in any such Court, may be proved either by examined copies or by copies authenticated as hereinafter mentioned; that is to say —

If the document sought to be proved be a proclamation, treaty, or other act of State, the authenticated copy to be admissible in evidence must purport to be sealed with the seal of the foreign State or British possession to which the original document belongs;

And if the document sought to be proved be a judgment, decree, order, or other judicial proceeding of any foreign Court, in any British possession, or an affidavit, pleading, or other legal document filed or deposited in any such Court, the authenticated copy to be admissible in evidence must purport either to be sealed with the seal of the foreign or other Court to which the original document belongs, or, in the event of such Court having no seal, to be signed by the judge, or, if there be more than one judge, by any one of the judges of the said Court, and such judge must attach to his signature a statement in writing on the said copy that the court whereof he is a judge has no seal;

If any of the aforesaid authenticated copies purports to be sealed or signed as hereinbefore mentioned, it is admissible in evidence in every case in which the original document could have been received in evidence, without any proof of the seal where a seal is necessary, or of the signature, or of the truth of the statement attached thereto, where such signature and statement are necessary, or of the judicial character of the person appearing to have made such signature and statement.[1]

Colonial laws assented to by the governors of colonies,

[1] 14 & 15 Vict. c. 99, s. 7.

and bills reserved by the governors of such colonies for the signification of Her Majesty's pleasure, and the fact (as the case may be) that such law has been duly and properly passed and assented to, or that such bill has been duly and properly passed and presented to the governor, may be proved (*primâ facie*) by a copy certified by the clerk or other proper officer of the legislative body of the colony to be a true copy of any such law or bill. Any proclamation purporting to be published by authority of the governor in any newspaper in the colony to which such law or bill relates, and signifying Her Majesty's disallowance of any such colonial law, or Her Majesty's assent to any such reserved bill, is *primâ facie* proof of such disallowance or assent.[1]

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[1] 28 & 29 Vict. c. 63, s. 6. "Colony" in this paragraph means "all Her Majesty's possessions abroad" having a legislature, "except the Channel Islands, the Isle of Man, and India." "Colony" in the rest of the article includes those places.

CHAPTER XI.

PRESUMPTIONS AS TO DOCUMENTS.

ARTICLE 85.

PRESUMPTION AS TO DATE OF A DOCUMENT.

WHEN any document bearing a date has been proved, it is presumed to have been made on the day on which it bears date, and if more documents than one bear date on the same day, they are presumed to have been executed in the order necessary to effect the object for which they were executed, but independent proof of the correctness of the date will be required if the circumstances are such that collusion as to the date might be practised, and would, if practised, injure any person, or defeat the objects of any law.[1]

Illustrations.

(*a*) An instrument admitting a debt, and dated before the act of bankruptcy, is produced by a bankrupt's assignees, to prove the petitioning creditor's debt. Further evidence of the date of the transaction is required in order to guard against collusion between the assignees and the bankrupt, to the prejudice of creditors whose claims date from the interval between the act of bankruptcy and the adjudication.[2]

(*b*) In a petition for damages on the ground of adultery letters are produced between the husband and wife, dated before the alleged adultery, and showing that they were then on affectionate terms. Further evidence of the date is required to prevent collusion, to the prejudice of the person petitioned against.[3]

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[1] 1 Ph. Ev. 482–483; T. E. s. 137; Best, s. 403; ⸢1 Greenl. Ev. § 40; Meldrum *v.* Clark, 1 Mor. (Iowa) 130; Abrams *v.* Pomeroy, 13 Ill. 133; New Haven *v.* Mitchell, 15 Conn. 206; Williams *v.* Wood, 16 Md. 220.⸣

[2] Anderson *v.* Weston, 6 Bing. N. C. 302; Sinclair *v.* Baggallay, M. & W. 318.

[3] Houlston *v.* Smith, 2 C. & P. 24.

ARTICLE 86.

PRESUMPTION AS TO STAMP OF A DOCUMENT.

When any document is not produced after due notice to produce, and after being called for, it is presumed to have been duly stamped,[1] unless it be shown to have remained unstamped for some time after its execution.[2]

ARTICLE 87.

PRESUMPTION AS TO SEALING AND DELIVERY OF DEEDS.

When any document purporting to be and stamped as a deed, appears or is proved to be or to have been signed and duly attested, it is presumed to have been sealed and delivered, although no impression of a seal appears thereon.[3]

ARTICLE 88.

PRESUMPTION AS TO DOCUMENTS THIRTY YEARS OLD.

Where any document purporting or proved to be thirty years old is produced from any custody which the judge in the particular case considers proper, it is presumed that the signature and every other part of such document which purports to be in the handwriting of any particular person is in that person's handwriting, and, in the case of a document executed or attested, that it was duly exe-

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[1] Closmadeuc *v.* Carrel, 18 C. B. 44. In this case the growth of the rule is traced, and other cases are referred to, in the judgment of Cresswell, J.

[2] Marine Investment Company *v.* Haviside, L. R. 5 E. & I. App. 624.

[3] Hall *v.* Bainbridge, 12 Q. B. 699–710; *Re* Sandilands, L. R. 6 C. P. 411. {This is a general statement of the law as it exists in this country. But the rule is not uniform. 2 Greenl. Ev. §§ 296, 297.}

cuted and attested by the persons by whom it purports to be executed and attested; and the attestation or execution need not be proved, even if the attesting witness is alive and in court.

Documents are said to be in proper custody if they are in the place in which, and under the care of the person with whom, they would naturally be; but no custody is improper if it is proved to have had a legitimate origin, or if the circumstances of the particular case are such as to render such an origin probable.[1]

ARTICLE 89.

PRESUMPTION AS TO ALTERATIONS.

No person producing any document which upon its face appears to have been altered in a material part can claim under it the enforcement of any right created by it, unless the alteration was made before the completion of the document or with the consent of the party to be charged under it or his representative in interest.

This rule extends to cases in which the alteration was made by a stranger, whilst the document was in the custody of the person producing it, but without his knowledge or leave.[2]

Alterations and interlineations appearing on the face of a deed are, in the absence of all evidence relating to them,

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[1] 2 Ph. Ev. 245–248; Starkie, 521–526; T. E. s. 74 and ss. 593–601; Best, s. 220; {1 Greenl. Ev. §§ 21, 142–144, 570.}

[2] Pigot's Case, 11 Rep. 47; Davidson *v.* Cooper, 11 M. & W. 778; 13 M. & W. 343; Aldous *v.* Cornwell, L. R. 3 Q. B. 573. This qualifies one of the resolutions in Pigot's Case. The judgment reviews a great number of authorities on the subject. {Alteration by a stranger, without the knowledge or fault of the party to the instrument, is not fatal to a claim under it by the real owner, by the great weight of authority in this country. 1 Greenl. Ev. § 566, n.; State *v.* Berg, 50 Ind. 496.}

presumed to have been made before the deed was completed.[1]

Alterations and interlineations appearing on the face of a will are, in the absence of all evidence relating to them, presumed to have been made after the execution of the will.[2]

There is no presumption as to the time when alterations and interlineations, appearing on the face of writings not under seal, were made [3] except that it is presumed that they were so made that the making would not constitute an offence.[4]

An alteration is said to be material when, if it had been made with the consent of the party charged, it would have affected his interest or varied his obligations in any way whatever.

An alteration which in no way affects the rights of the parties or the legal effect of the instrument, is immaterial.[5]

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[1] Doe *v.* Catomore, 16 Q. B. 745. {Upon this point the cases in this country conflict, with the weight of authority that there is no presumption either way, but that it is for the jury to decide when the alteration was made. 1 Greenl. Ev. § 564.}

[2] Simmons *v.* Rudall, 1 Sim. N. S. 136. {The English Statute of Wills requires alterations made before execution to be noted; hence those not noted may be presumed not to have been made after execution. Doe *v.* Palmer, 15 Jur. 836. But there are other grounds for this distinction between deeds and wills. See 1 Redfield on Wills, pp. 315, 316.}

[3] Knight *v.* Clements, 8 A. & E. 215; {1 Greenl. Ev. § 564, n. 3.}

[4] R. *v.* Gordon, Dearsley & P. 592; {1 Greenl. Ev. § 564, n. 3.}

[5] This appears to be the result of many cases referred to in T. E. ss. 1619–1620; see also the judgments in Davidson *v.* Cooper and Aldous *v.* Cornwell, referred to above. {It would seem that to constitute materiality the alteration must be in the interest of the party who makes the alteration. Coulson *v.* Walton, 9 Pet. (U. S.) 789; Bailey *v.* Taylor, 11 Conn. 531; 1 Greenl. Ev. § 568.}

CHAPTER XII.

OF THE EXCLUSION OF ORAL BY DOCUMENTARY EVIDENCE, AND OF THE MODIFICATION AND INTERPRETATION OF DOCUMENTARY BY ORAL EVIDENCE.

ARTICLE 90.*

EVIDENCE OF TERMS OF CONTRACTS, GRANTS, AND OTHER DISPOSITIONS OF PROPERTY REDUCED TO A DOCUMENTARY FORM.

WHEN any judgment of any Court or any other judicial or official proceeding, or any contract or grant, or any other disposition of property, has been reduced to the form of a document or series of documents, no evidence may be given of such judgment or proceeding, or of the terms of such contract, grant, or other disposition of property, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained.[1] Nor may the contents of any such document be contradicted, altered, added to, or varied by oral evidence.[2]

Provided that any of the following matters may be proved —

(1) Fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, the fact that it is wrongly dated,[3] want or failure of consideration,

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* See Appendix, Note XXXII.

[1] Illustrations (*a*) and (*b*); {1 Greenl. Ev. §§ 275, 276, 281.}

[2] {This last proposition is applicable only to the parties to the instrument. 1 Greenl. Ev. § 279; *post*, art. 92.}

[3] Reffell *v.* Reffell, L. R. 1 P. & D. 139. {So that it was executed on a day different from the date, Draper *v.* Snow, 20 N. Y. 331; or

or mistake in fact or law,[1] or any other matter which, if proved, would produce any effect upon the validity of any document, or of any part of it, or which would entitle any person to any judgment, decree, or order relating thereto.[2]

(2) The existence of any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms, if from the circumstances of the case the Court infers that the parties did not intend the document to be a complete and final statement of the whole of the transaction between them.[3]

(3) The existence of any separate oral agreement, constituting a condition precedent to the attaching of any obligation under any such contract, grant, or disposition of property.[4]

(4) The existence of any distinct subsequent oral agreement to rescind or modify any such contract, grant, or disposition of property, provided that such agreement is not invalid under the Statute of Frauds, or otherwise.[5]

(5) Any usage or custom by which incidents not expressly mentioned in any contract are annexed to contracts of that description; unless the annexing of such incident to such contract would be repugnant to or inconsistent with the express terms of the contract.[6]

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to show that the certificate of acknowledgment is untrue, Smith *v.* Ward, 2 Root (Conn.), 374.} Mr. Starkie extends this to mistakes in some other formal particulars. 3 Star. Ev. 787–788.

[1] {In the absence of fraud or mistake of fact, parol evidence is inadmissible to correct a mistake of law. Potter *v.* Sewall, 54 Me. 142.}

[2] Illustration (*c*); {1 Greenl. Ev. §§ 284, 296 *a*, 304.}

[3] Illustrations (*d*) and (*e*); {1 Greenl. Ev. § 284 *a*.}

[4] Illustrations (*f*) and (*g*); {1 Greenl Ev. § 284, n. 2, p. 331.}

[5] Illustration (*h*); {1 Greenl. Ev. §§ 302–304. The fact that the modifying agreement is within the Statute of Frauds has been held in this country not to be material. Stearns *v.* Hall, 9 Cush. (Mass.) 31.}

[6] Wigglesworth *v.* Dallison, and note thereto, S. L. C. 598–628; {1 Greenl. Ev. § 294.}

Oral evidence of a transaction is not excluded by the fact that a documentary memorandum of it was made, if such memorandum was not intended to have legal effect as a contract, or other disposition of property.[1]

Oral evidence of the existence of a legal relation is not excluded by the fact that it has been created by a document, when the fact to be proved is the existence of the relationship itself, and not the terms on which it was established or is carried on.[2]

The fact that a person holds a public office need not be proved by the production of his written or sealed appointment thereto, if he is shown to have acted in it.[3]

Illustrations.

(*a*) A policy of insurance is effected on goods "in ships from Surinam to London." The goods are shipped in a particular ship, which is lost.

The fact that that particular ship was orally excepted from the policy cannot be proved.[4]

(*b*) An estate called Gotton Farm is conveyed by a deed which describes it as consisting of the particulars described in the first division of a schedule and delineated in a plan on the margin of the schedule.

Evidence cannot be given to show that a close not mentioned in the schedule or delineated in the plan was always treated as part of Gotton Farm, and was intended to be conveyed by the deed.[5]

(*c*) A institutes a suit against B for the specific performance of a contract, and also prays that the contract may be reformed as to one of its provisions, as that provision was inserted in it by mistake.

A may prove that such a mistake was made as would entitle him to have the contract reformed.[6]

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[1] Illustration (*i*). {This rule is applicable to mere receipts and bills of parcels generally. 1 Greenl. Ev. § 305 *a*.}

[2] Illustration (*k*).

[3] See authorities collected in 1 Ph. Ev. 449–450; T. E. s. 189; {1 Greenl. Ev. §§ 83, 92.}

[4] Weston *v.* Eames, 1 Tau. 115.

[5] Barton *v.* Dawes, 10 C. B. 261–265.

[6] Story's Equity Jurisprudence, chap. v. ss. 153–162.

(*d*) A lets land to B, and they agree that a lease shall be given by A to B.

Before the lease is given, B tells A that he will not sign it unless A promises to destroy the rabbits. A does promise. The lease is afterwards granted, and reserves sporting rights to A, but does not mention the destruction of the rabbits. B may prove A's verbal agreement as to the rabbits.[1]

(*e*) A & B agree verbally that B shall take up an acceptance of A's, and that thereupon A and B shall make a written agreement for the sale of certain furniture by A to B. B does not take up the acceptance. A may prove the verbal agreement that he should do so.[2]

(*f*) A & B enter into a written agreement for the sale of an interest in a patent, and at the same time agree verbally that the agreement shall not come into force unless C approves of it. C does not approve. The party interested may show this.[3]

(*g*) A, a farmer, agrees in writing to transfer to B, another farmer, a farm which A holds of C. It is verbally agreed that the agreement is to be conditional on C's consent. B sues A for not transferring the farm. A may prove the condition as to C's consent and the fact that he does not consent.[4]

(*h*) A agrees in writing to sell B 14 lots of freehold land and make a good title to each of them. Afterwards B consents to take one lot though the title is bad. Apart from the Statute of Frauds this agreement might be proved.[5]

(*i*) A sells B a horse, and verbally warrants him quiet in harness. A also gives B a paper in these words: "Bought of A a horse for 7*l.* 2*s.* 6*d.*"

B may prove the verbal warranty.[6]

(*j*) The question is, whether A gained a settlement by occupying and paying rent for a tenement. The facts of occupation and payment of rent may be proved by oral evidence, although the contract is in writing.[7]

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[1] Morgan *v.* Griffiths, L. R. 6 Ex. 70; and see Angell *v.* Duke, L. R. 10 Q. B. 174.

[2] Lindley *v.* Lacey, 17 C. B. N. S. 578.

[3] Pym *v.* Campbell, 6 E. & B. 370.

[4] Wallis *v.* Littell, 11 C. B. N. S. 369.

[5] Goss *v.* Lord Nugent, 5 B. & Ad. 58, 65.

[6] Allen *v.* Prink, 4 M. & W. 140.

[7] R. *v.* Hull, 7 B. & C. 611.

ARTICLE 91.*

WHAT EVIDENCE MAY BE GIVEN FOR THE INTERPRETATION OF DOCUMENTS.

(1) Putting a construction upon a document means ascertaining the meaning of the signs or words made upon it, and their relation to facts.

(2) In order to ascertain the meaning of the signs and words made upon a document, oral evidence may be given of the meaning of illegible or not commonly intelligible characters, of foreign, obsolete, technical, local, and provincial expressions, of abbreviations, and of common words which, from the context, appear to have been used in a peculiar sense;[1] but evidence may not be given to show that common words, the meaning of which is plain, and which do not appear from the context to have been used in a peculiar sense, were in fact so used.[2]

(3) If the words of a document are so defective or ambiguous as to be unmeaning, no evidence can be given to show what the author of the document intended to say.[3]

(4) In order to ascertain the relation of the words of a document to facts, every fact may be proved to which it refers, or may probably have been intended to refer,[4] or which identifies any person or thing mentioned in it.[5]

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* See Appendix, Note XXXIII.

[1] Illustrations (*a*), (*b*), (*c*); {1 Greenl. Ev. §§ 280–295.}

[2] Illustration (*d*); {1 Greenl. Ev. § 259; Spears *v.* Ward, 48 Ind. 541. But oral evidence may be used to explain the word "barrel" as used in the petroleum trade, Miller *v.* Stevens, 100 Mass. 518; and of "dollars," used in a contract under the Confederate government, Thorington *v.* Smith, 8 Wall. (U. S.) 1.}

[3] Illustrations (*e*) and (*f*); {1 Greenl. Ev. § 300.}

[4] See all the Illustrations; {1 Greenl. Ev. §§ 286–290.}

[5] Illustration (*g*); {1 Greenl. Ev. §§ 286–290.}

Such facts are hereinafter called the circumstances of the case.[1]

(5) If the words of a document have a proper legal meaning, and also a less proper meaning, they must be deemed to have their proper legal meaning, unless such a construction would be unmeaning in reference to the circumstances of the case, in which case they may be interpreted according to their less proper meaning.[2]

(6) If the document has one distinct meaning in reference to the circumstances of the case, it must be construed accordingly, and evidence to show that the author intended to express some other meaning is not admissible.[3]

(7) If the document applies in part but not with accuracy to the circumstances of the case, the Court may draw inferences from those circumstances as to the meaning of the document, whether there is more than one, or only one thing or person to whom or to which the inaccurate description may apply. In such cases no evidence can be given of statements made by the author of the document as to his intentions in reference to the matter to which the document relates, though evidence may be given as to his circumstances, and as to his habitual use of language or names for particular persons or things.[4]

(8) If the language of the document, though plain in itself, applies equally well to more objects than one, evidence may be given both of the circumstances of the case and of statements made by any party to the document as to his intentions in reference to the matter to which the document relates.[5]

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[1] As to proving facts showing the knowledge of the writer, and for an instance of a document which is not admissible for that purpose, see Adie *v.* Clark, L. R. 3 Ch. Div. 134, 142.

[2] Illustration (*h*). [3] Illustration (*i*); {1 Greenl. Ev. § 290.}

[4] Illustrations (*k*), (*l*), (*m*); {1 Greenl. Ev. § 289.}

[5] Illustration (*n*); {1 Greenl. Ev. §§ 288–290.}

(9) If the document is of such a nature that the Court will presume that it was executed with any other than its apparent intention, evidence may be given to show that it was in fact executed with its apparent intention.[1]

Illustrations.

(*a*) A lease contains a covenant as to "ten thousand" rabbits. Oral evidence to show that a thousand meant, in relation to rabbits, 1200, is admissible.[2]

(*b*) A sells to B "1170 bales of gambier." Oral evidence is admissible to show that a "bale" of gambier is a package compressed, and weighing 2 cwt.[3]

(*c*) A, a sculptor, leaves to B "all the marble in the yard, the tools in the shop, bankers, mod tools for carving." Evidence to show whether "mod" meant models, moulds, or modelling-tools, and to show what bankers are, may be given.

(*d*) Evidence may not be given to show that the word "boats," in a policy of insurance, means "boats not slung on the outside of the ship on the quarter."[4]

(*e*) A leaves an estate to K, L, M, &c., by a will dated before 1888. Eight years afterwards A declares that by these letters he meant particular persons. Evidence of this declaration is not admissible. Proof that A was in the habit of calling a particular person M would have been admissible.[5]

(*f*) A leaves a legacy to ——. Evidence to show how the blank was intended to be filled is not admissible.[6]

(*g*) Property was conveyed in trust in 1704 for the support of "Godly preachers of Christ's holy Gospel." Evidence may be given to show what class of ministers were at the time known by that name.[7]

(*h*) A leaves property to his "children." If he has both legitimate and illegitimate children the whole of the property will go to the

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[1] Illustration (*o*); {1 Greenl. Ev. § 296.}

[2] Smith *v.* Wilson, 3 B. & Ad. 728.

[3] Gorrissen *v.* Perrin, 2 C. B. N. S. 681.

[4] Blackett *v.* Royal Exchange Co., 2 C. & J. 244.

[5] Clayton *v.* Lord Nugent, 13 M. & W. 200; see 205–206.

[6] Baylis *v.* A. G., 2 Atk. 239.

[7] Shore *v.* Wilson, 9 C. & F. 365, 565–566.

legitimate children. If he has only illegitimate children, the property may go to them.[1]

(*i*) A testator leaves all his estates in the county of Limerick and city of Limerick to A. He had no estates in the county of Limerick, but he had estates in the county of Clare, of which the will did not dispose. Evidence cannot be given to show that the words "of Clare" had been erased from the draft by mistake, and so omitted from the will as executed.[2]

(*j*) A leaves a legacy to "Mrs. and Miss Bowden." No such persons were living at the time when the legacy was made, but Mrs. Washburne, whose maiden name had been Bowden, was living, and had a daughter, and the testatrix used to call them Bowden. Evidence of these facts was admitted.[3]

(*k*) A devises land to John Hiscocks, the eldest son of John Hiscocks. John Hiscocks had two sons, Simon, his eldest, and John, his second son, who, however, was the eldest son by a second marriage. The circumstances of the family, but not the testator's declarations of intention, may be proved in order to show which of the two was intended.[4]

(*l*) A devises property to Elizabeth, the natural daughter of B. B has a natural son John, and a legitimate daughter Elizabeth. The Court may infer from the circumstances under which the natural child was born, and from the testator's relationship to the putative father, that he meant to provide for John.[5]

(*m*) A leaves a legacy to his niece, Elizabeth Stringer. At the date of the will he had no such niece, but he had a great-great-niece named Elizabeth Jane Stringer. The Court may infer from these circumstances that Elizabeth Jane Stringer was intended; but they may not refer to instructions given by the testator to his solicitor, showing that the legacy was meant for a niece, Elizabeth Stringer,

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[1] Wig. Ext. Ev. pp. 18, 19, and note of cases. {But see 1 Greenl. Ev. § 288, n. 2, p. 336.}

[2] Miller *v.* Travers, 8 Bing. 244. {Where a testator devised lot 22 in A, parol evidence is not admissible to show that he intended lot 23. Kurtz *v.* Hibner, 55 Ill. 514; Fitzpatrick *v.* Fitzpatrick, 36 Iowa, 674. See also Am. Law Reg. N. S. vol. xix., pp. 94 and 353, where the point considered is discussed by Judges Redfield and Caton, *pro* and *con*. See also note to K. *v.* H., in 8 Am. Repts. 669.}

[3] Lee *v.* Pain, 4 Hare, 251–253.

[4] Doe *v.* Hiscocks, 5 M. & W. 363.

[5] Ryall *v.* Hannam, 10 Beav. 536.

who had died before the date of the will, and that it was put into the will by a mistake on the part of the solicitor.[1]

(*n*) A devises one house to George Gord, the son of George Gord, another to George Gord the son of John Gord, and a third to George Gord the son of Gord. Evidence both of circumstances and of the testator's statements of intention may be given to show which of the two George Gords he meant.[2]

(*o*) A leaves two legacies of the same amount to B, assigning the same motive for each legacy, one being given in his will, the other in a codicil. The Court presumes that they are not meant to be cumulative, but the legatee may show, either by proof of surrounding circumstances, or of declarations by the testator, that they were.[3]

ARTICLE 92.*

CASES TO WHICH ARTICLES 90 AND 91 DO NOT APPLY.

Articles 90 and 91 apply only to parties to documents, and to their representatives in interest, and only to cases in which some civil right or civil liability dependent upon the terms of a document is in question. Any person other than a party to a document or his representative in interest may, notwithstanding the existence of any document, prove any fact which he is otherwise entitled to prove; and any party to any document or any representative in interest of any such party may prove any such fact for any purpose other than that of varying or altering any right or liability depending upon the terms of the document.

{1 Greenl. Ev. § 279.}

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* See Appendix, Note XXXIV.

[1] Stringer *v.* Gardiner, 27 Beav. 35; 4 De G. & J. 468.

[2] Doe *v.* Needs, 2 M. & W. 129.

[3] Per Leach, V. C., in Hurst *v.* Leach, 5 Madd. 351, 360–361. The rule in this case was vindicated, and a number of other cases, both before and after it, were elaborately considered by Lord St. Leonards, when chancellor of Ireland, in Hall *v.* Hill, 1 Dru. & War. 94, 111–133.

Illustrations.

(*a*) The question is, whether A, a pauper, is settled in the parish of Cheadle. A deed of conveyance to which A was a party is produced, purporting to convey land to A for a valuable consideration. The parish appealing against the order was allowed to call A as a witness to prove that no consideration passed.[1]

(*b*) The question is, whether A obtained money from B under false pretences. The money was obtained as a premium for executing a deed of partnership, which deed stated a consideration other than the one which constituted the false pretence. B may give evidence of the false pretence although he executed the deed mis-stating the consideration for the premium.[2]

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[1] R. *v.* Cheadle, 3 B. & Ad. 833.

[2] R. *v.* Adamson, 2 Moody, 286.

PART III.

PRODUCTION AND EFFECT OF EVIDENCE.

CHAPTER XIII.*

BURDEN OF PROOF.

ARTICLE 93.†

HE WHO AFFIRMS MUST PROVE.

WHOEVER desires any Court to give judgment as to any legal right or liability dependent on the existence or non-existence of facts which he asserts or denies to exist, must prove that those facts do or do not exist.[1]

ARTICLE 94.†

PRESUMPTION OF INNOCENCE.

If the commission of a crime is directly in issue in any proceeding, criminal or civil, it must be proved beyond reasonable doubt.[2]

The burden of proving that any person has been guilty

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* See Appendix, Note XXXV. † See Appendix, Note XXXVI.

[1] 1 Ph. Ev. 552; T. E. (from Greenleaf), s. 337; Best, ss. 265–266; Starkie, 585–586; {1 Greenl. Ev. § 74.}

[2] {The law, by the great weight of authority in this country, is held to be that where, in a civil action, the commission of a crime by either party is to be proved, it may be proved by a preponderance of evidence. And it is at least doubtful if the English authorities support the proposition of the learned author. See the subject fully considered and the cases examined in 10 Am. Law Rev. N. S. 642; 2 Greenl. Ev. §§ 408, n., 426, notes.}

of a crime or wrongful act is on the person who asserts it, whether the commission of such act is or is not directly in issue in the action.

Illustrations.

(*a*) A sues B on a policy of fire insurance. B pleads that A burnt down the house insured. B must prove his plea as fully as if A were being prosecuted for arson.[1]

(*b*) A sues B for damage done to A's ship by inflammable matter loaded thereon by B without notice to A's captain. A must prove the absence of notice.[2]

(*c*) The question in 1819 is, whether A is settled in the parish of a man to whom she was married in 1813. It is proved that in 1812 she was married to another person, who enlisted soon afterwards, went abroad on service, and had not been heard of afterwards. The burden of proving that the first husband was alive at the time of the second marriage is on the person who asserts it.[3]

ARTICLE 95.

ON WHOM THE GENERAL BURDEN OF PROOF LIES.

The burden of proof in any proceeding lies at first on that party against whom the judgment of the Court would be given if no evidence at all were produced on either side, regard being had to any presumption which may appear upon the pleadings.[4] As the proceeding goes on, the burden of proof may be shifted from the party on whom it rested at first by his proving facts which raise a presumption in his favor.[5]

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[1] Thurtell *v.* Beaumont, 1 Bing. 339. {Held otherwise in this country by the great weight of authority. See *ante*, p. 152, note; May on Insurance, § 583.}

[2] Williams *v.* East India Co., 3 Ea. 102, 198–199.

[3] R. *v.* Twyning, 2 B. & A. 386.

[4] {Veiths *v.* Hagge, 8 Iowa, 163; Amos *v.* Hughes, 1 M. & R. 464.}

[5] 1 Ph. Ev. 552; T. E. ss. 338–339; {1 Greenl. Ev. § 74. It is not strictly correct to say that the burden of proof shifts. Each takes and carries through the case the burden of the facts he is bound to

Illustrations.

(*a*) It appears upon the pleadings that A is indorsee of a bill of exchange. The presumption is that the indorsement was for value, and the party interested in denying this must prove it.[1]

(*b*) A, a married woman, is accused of theft and pleads not guilty. The burden of the proof is on the prosecution. She is shown to have been in possession of the stolen goods soon after the theft. The burden of proof is shifted to A. She shows that she stole them in the presence of her husband. The burden of proving that she was not coerced by him is shifted on to the prosecutor.[2]

(*c*) A is indicted for bigamy. On proof by the prosecution of the first marriage, A proves that at the time he was a minor. This throws on the prosecution the burden of proving the consent of A's parents.[3]

(*d*) A deed of gift is shown to have been made by a client to his solicitor. The burden of proving that the transaction was in good faith is on the solicitor.[4]

(*e*) It is shown that a hedge stands on A's land. The burden of proving that the ditch adjacent to it is not A's also is on the person who denies that the ditch belongs to A.[5]

(*f*) A proves that he received the rent of land. The presumption is, that he is owner in fee-simple, and the burden of proof is on the person who denies it.[6]

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prove. 1 Greenl. Ev. § 74, notes 1, 2, p. 93. The burden does not shift, so long as evidence is offered, on one side or the other, as to the same fact alleged by the plaintiff. But if the defendant, for instance, sets up another and distinct fact in avoidance, he takes the burden of proving it. Thus, when a contract is to be void on the happening of a certain event, the party who seeks to avail himself of that fact must allege and prove it. Catlin *v.* Springfield Fire Ins. Co., 1 Sum. (U. S. C. Ct.) 434. So, when a prisoner sets up that he was under the age of presumed capacity. State *v.* Arnold, 13 Ired. (N. C.) Law, 184. But as to this last case, see note to Illustration (*c*), art. 97.} Starkie, 586–587 & 748; Best, s. 268.

[1] Mills *v.* Barber, 1 M. & W. 425.

[2] 1 Russ. Cri. 33; and 2, 337.

[3] R. *v.* Butler, 1 R. & R. 61.

[4] 1 Story Eq. Juris. s. 310, n. 1. Quoting Hunter *v.* Atkins, 3 M. & K. 113. {And the presumption is against the solicitor. Brown *v.* Bulkley, 13 N. J. Eq. 451.}

[5] Guy *v.* West, Selw. N. P. 1297.

[6] Doe *v.* Coulthred, 7 A. & E. 235.

(*g*) A finds a jewel mounted in a socket, and gives it to B to look at. B keeps it, and refuses to produce it on notice, but returns the socket. The burden of proving that it is not as valuable a stone of the kind as would go into the socket is on B.[1]

(*h*) A sues B on a policy of insurance, and shows that the vessel insured went to sea, and that after a reasonable time no tidings of her have been received, but that her loss had been rumored. The burden of proving that she has not foundered is on B.[2]

ARTICLE 96.

BURDEN OF PROOF AS TO PARTICULAR FACT.

The burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence, unless it is provided by any law that the burden of proving that fact shall lie on any particular person;[3] but the burden may in the course of a case be shifted from one side to the other, and in considering the amount of evidence necessary to shift the burden of proof the Court has regard to the opportunities of knowledge with respect to the fact to be proved which may be possessed by the parties respectively.

Illustrations.

(*a*) A prosecutes B for theft, and wishes the Court to believe that B admitted the theft to C. A must prove the admission.

B wishes the court to believe that, at the time in question, he was elsewhere. He must prove it. {In this country, it is pretty generally held, in the absence of statutory regulation, that if any fact mate-

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[1] Armoury *v.* Delamirie, 1 S. L. C. 357. {This rule rests upon the doctrine that the presumption is against the party who can, and will not, produce evidence to explain an ambiguity. But where a party is not shown to be able to produce such evidence, the rule is different. Thus, when the delivery of a bank-note is proved without proof of its denomination, the presumption is in favor of the defendant, that it is the smallest in circulation. Lawton *v.* Sweeney, 8 Jur. 964.}

[2] Koster *v.* Reed, 6 B. & C. 19.

[3] For instances of such provisions see T. E. ss. 345–346; {1 Greenl. Ev. §§ 78, 79.}

rial to the case be set up in the pleadings, whether by a negative averment or otherwise, some proof of the existence of such fact must be given. 1 Greenl. Ev. §§ 78, 79, and notes; Conyers *v.* State, 50 Ga. 103; Mehan *v.* State, 7 Wis. 670; State *v.* Hirsch, 45 Mo. 429; United States *v.* Gooding, 12 Wheat. (U. S.) 460. Although some cases following Rex *v.* Turner, 5 M. & S. 206 (which is doubted by Mr. Baron Alderson in Elkin *v.* Janson, 13 M. & W. 662), hold that no evidence of such fact need be given by the party alleging it, if it is peculiarly within the knowledge of his adversary; as, for instance, that he has no license. State *v.* Foster, 23 N. H. 348; Great Western R. R. *v.* Bacon, 30 Ill. 347. Some authorities support the proposition that, when an act is by the common law or statute generally unlawful, unless specially authorized, the presumption, whenever the question of authority arises, is, that it does not exist, which presumption supports the negative allegation, and that it is for the person doing the act to show his authority. Bliss *v.* Brainard, 41 N. H. 256; Wheat *v.* State, 6 Mo. 455; Solomon *v.* Dreschler, 4 Minn. 278; Welsh *v.* State, 11 Texas, 568.}

(*b*) A, a shipowner, sues B, an underwriter, on a policy of insurance on a ship. B alleges that A knew of and concealed from B material facts. B must give enough evidence to throw upon A the burden of disproving his knowledge; but slight evidence will suffice for this purpose.[1]

(*c*) In actions for penalties under the old game laws, though the plaintiff had to aver that the defendant was not duly qualified, and was obliged to give general evidence that he was not, the burden of proving any definite qualification was on the defendant.[2]

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[1] Elkin *v.* Janson, 13 M. & W. 655. See, especially, the judgment of Alderson, B., 663–666.

[2] 1 Ph. Ev. 556, and cases there quoted. The illustration is founded more particularly on R. *v.* Jarvis, in a note to R. *v.* Stone, 1 Ea. 639, where Lord Mansfield's language appears to imply what is stated above. {This proposition is not generally accepted as law in this country. The generally accepted doctrine here is that the government always assumes the burden of proof upon the whole evidence as to such allegations as it is essential to make. Com. *v.* Pomeroy, 117 Mass. 143; State *v.* Pike, 49 N. H. 395; People *v.* Garbutt, 17 Mich. 9; State *v.* Crawford, 11 Kan. 32; 1 Greenl. Ev. §§ 81 *b*, 81 *e*. In New York and Pennsylvania, the rule as stated by the author seems to prevail. Flannigan *v.* People, 52 N. Y. 467; Lynch *v.* Com., 77 Pa. St. 205. See, on this subject, a valuable note to State *v.* Crawford, 23 Am. Law Reg. N. S. 21.}

ARTICLE 97.

BURDEN OF PROVING FACT TO BE PROVED TO MAKE EVIDENCE ADMISSIBLE.

The burden of proving any fact necessary to be proved in order to enable any person to give evidence of any other fact is on the person who wishes to give such evidence.

Illustrations.

(*a*) A wishes to prove a dying declaration by B.

A must prove B's death, and the fact that he had given up all hope of life when he made the statement.

(*b*) A wishes to prove, by secondary evidence, the contents of a lost document.

A must prove that the document has been lost. {Christy *v.* Kavanagh, 45 Mo. 375; People *v.* Mariano Soto, 49 Cal. 67; Durgin *v.* Danville, 47 Vt. 95.}

CHAPTER XIV.

ON PRESUMPTIONS AND ESTOPPELS.*

ARTICLE 98.

PRESUMPTION OF LEGITIMACY.

THE fact that any person was born during the continuance of a valid marriage between his mother and any man, or within such a time after the dissolution thereof and before the celebration of another valid marriage, that his mother's husband could have been his father, is conclusive proof that he is the legitimate child of his mother's husband, unless it can be shown

either that his mother and her husband had no access to each other at any time when he could have been begotten, regard being had both to the date of the birth and to the physical condition[1] of the husband,

or that the circumstances of their access (if any) were such as to render it highly improbable that sexual intercourse took place between them when it occurred.

Neither the mother nor the husband is a competent witness as to the fact of their having or not having had sexual intercourse with each other, nor are any declarations by them upon that subject deemed to be relevant facts when the legitimacy of the woman's child is in question, whether the mother or her husband can be called as a witness or not, provided that in applications

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* See Appendix, Note XXXV.

[1] {This, doubtless, is intended to refer to the impotency of the husband. Hargrave *v.* Hargrave, 9 Beav. 552.}

for affiliation orders when proof has been given of the non-access of the husband at any time when his wife's child could have been begotten, the wife may give evidence as to the person by whom it was begotten.[1]

ARTICLE 99.

PRESUMPTION OF DEATH FROM SEVEN YEARS' ABSENCE.

A person shown not to have been heard of for seven years by those (if any) who if he had been alive would naturally have heard of him, is presumed to be dead, unless the circumstances of the case are such as to account for his not being heard of without assuming his death; but there is no presumption as to the time when he died, and the burden of proving his death at any particular time is upon the person who asserts it.[2]

There is no presumption as to the age at which a person died who is shown to have been alive at a given

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[1] R. *v.* Luffe, 8 Ea. 207; Cope *v.* Cope, 1 Mo. & Ro. 272–274; Legge *v.* Edmonds, 25 L. J. Eq. 125, see p. 135; R. *v.* Mansfield, 1 Q. B. 444; Morris *v.* Davies, 3 C. & P. 215; {1 Greenl. Ev. §§ 28, 253; 2 id. § 150, and notes; Phillips *v.* Allen, 2 Allen (Mass.), 453. The testimony of the mother in bastardy cases is variously regulated in the different States.} I am not aware of any decision as to the paternity of a child born say six months after the death of one husband, and three months after the mother's marriage to another. Amongst common soldiers in India such a question might easily arise. The rule in European regiments is that a widow not remarried within the year (it used to be six months) must leave the regiment: the result was and is that widowhoods are usually very short.

[2] McMahon *v.* McElroy, 5 Ir. Rep. Eq. 1; Hopewell *v.* De Pinna, 2 Camp. 113; Nepean *v.* Doe, 2 S. L. C. 562, 681; Nepean *v.* Knight, 2 M. & W. 894, 912; R. *v.* Lumley, L. R. 1 C. C. R. 196; and see the caution of Lord Denman in R. *v.* Harborne, 2 A. & E. 544. All the cases are collected and considered in In re Phené's Trust, L. R. 5 Ch. App. 139; {1 Greenl. Ev. § 41.}

time, or as to the order in which two or more persons died who are shown to have died in the same accident, shipwreck, or battle.[1]

ARTICLE 100.

PRESUMPTION OF LOST GRANT.

When it has been shown that any person has, for a long period of time, exercised any proprietary right which might have had a lawful origin by grant or license from the Crown or from a private person, and the exercise of which might and naturally would have been prevented by the persons interested if it had not had a lawful origin, there is a presumption that such right had a lawful origin and that it was created by a proper instrument which has been lost.

{1 Greenl. Ev. § 46.}

Illustrations.

(*a*) The question is, whether B is entitled to recover from A the possession of lands which A's father and mother successively occupied from 1754 to 1792 or 1793, and which B had occupied (without title) from 1793 to 1809. The lands formed originally an encroachment on the Forest of Dean.

The undisturbed occupation for thirty-nine years raises a presumption of a grant from the Crown to A's father.[2]

(*b*) A fishing mill-dam was erected more than 110 years before 1861 in the River Derwent, in Cumberland (not being navigable at that place), and was used for more than sixty years before 1861 in the manner in which it was used in 1861. This raises a presumption, that all the upper proprietors whose rights were injuriously affected by the dam, had granted a right to erect it.[3]

(*c*) A builds a windmill near B's land in 1829, and enjoys a free

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[1] Wing *v.* Angrave, 8 H. L. C. 183, 198; and see authorities in last note; {1 Greenl. Ev. §§ 30, 41.}

[2] Goodtitle *v.* Baldwin, 11 Ea. 488. The presumption was rebutted in this case by an express provision of 20 Ch. II. c. 8, avoiding grants of the Forest of Dean. See also Doe *d.* Devine *v.* Wilson, 10 Moo. P. C. 502.

[3] Leconfield *v.* Lonsdale, L. R. 5 C. P. 657.

current of air to it over B's land as of right, and without interruption till 1860. This enjoyment raises no presumption of a grant by B of a right to such a current of air, as it would not be natural for B to interrupt it.[1]

(*d*) No length of enjoyment (by means of a deep well) of water, percolating through underground undefined passages, raises a presumption of a grant from the owners of the ground under which the water so percolates of a right to the water.[2]

ARTICLE 101.*

PRESUMPTION OF REGULARITY AND OF DEEDS TO COMPLETE TITLE.

When any judicial or official act is shown to have been done in a manner substantially regular, it is presumed that formal requisites for its validity were complied with.

When a person in possession of any property is shown to be entitled to the beneficial ownership thereof, there is a presumption that every instrument has been executed which it was the legal duty of his trustees to execute in order to perfect his title.[3]

ARTICLE 102.†

ESTOPPEL BY CONDUCT.

When one person by any thing which he does or says, or abstains from doing or saying, intentionally[4] causes or

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* See Appendix, Note XXXVII., and Macdougall *v.* Purrier, 8 Bligh, N. C. 433. R. *v.* Cresswell, L. R. 1 Q. B. D. (C. C. R.) 446, is a recent illustration of the effect of this presumption.

† See Appendix, Note XXXVIII.

[1] Webb *v.* Bird, 13 C. B. N. S. 841.

[2] Chasemore *v.* Richards, 7 H. L. C. 849; {Roath *v.* Driscoll, 20 Conn. 533; Wheatley *v.* Baugh, 25 Pa. St. 528.}

[3] Doe *d.* Hammond *v.* Cooke, 6 Bing. 174, 179.

[4] {This word "intentionally" seems to have been substituted for the word "wilfully," used in Pickard *v.* Sears; no doubt by reason

permits another person to believe a thing to be true, and to act upon such belief otherwise than but for that belief he would have acted, neither the person first mentioned nor his representative in interest is allowed, in any suit or proceeding between himself and such person or his representative in interest, to deny the truth of that thing.

When any person under a legal duty to any other person to conduct himself with reasonable caution in the transaction of any business neglects that duty, and when the person to whom the duty is owing alters his position for the worse because he is misled as to the conduct of the negligent person by a fraud, of which such neglect is in the natural course of things the proximate cause, the negligent person is not permitted to deny that he acted in the manner in which the other person was led by such fraud to believe him to act.

Illustrations.

(*a*) A, the owner of machinery in B's possession, which is taken in execution by C, abstains from claiming it for some months, and converses with C's attorney without referring to his claim, and by these means impresses C with the belief that the machinery is B's. C sells the machinery. A is estopped from denying that it is B's.[1]

(*b*) A, a retiring partner of B, gives no notice to the customers of the firm that he is no longer B's partner. In an action by a customer, he cannot deny that he is B's partner.[2]

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of what fell from the court afterwards in Freeman *v.* Cooke, 2 Exch. 654. The exact meaning of the word is still an open question. See Bigelow on Estoppel, 485 *et seq.* See also Hawes *v.* Marchant, 1 Curtis, C. Ct. 136.}

[1] Pickard *v.* Sears, 6 A. & E. 469, 474; {Stephens *v.* Baird, 9 Cow. (N. Y.) 274; Redd *v.* Muscogee R. R. Co., 48 Ga. 102; Horn *v.* Cole, 51 N. H. 287.}

[2] (Per Parke, B.) Freeman *v.* Cooke, 2 Ex. 661. {An insurance company renews a policy, with full knowledge that certain statements in the application are untrue. It cannot set up the untrue statement as a defence in a suit for the loss. Wetherell *v.* Mar. Ins. Co., 49 Me. 200. See also May on Insurance, § 502 *et seq.*}

(*c*) A sues B for a wrongful imprisonment. The imprisonment was wrongful, if B had a certain original warrant; rightful, if he had only a copy. B had in fact a copy. He led A to believe that he had the original, though not with the intention that A should act otherwise than he actually did; nor did A so act. B may show that he had only a copy and not the original.[1]

(*d*) A sells eighty quarters of barley to B, but does not specifically appropriate to B any quarters. B sells sixty of the eighty quarters to C. C informs A, who assents to the transfer. C being satisfied with this, says nothing further to B as to delivery. B becomes bankrupt. A cannot, in an action by C to recover the barley, deny that he holds for C on the ground that, for want of specific appropriation, no property passed to B.[2]

(*e*) A signs blank cheques and gives them to his wife to fill up as she wants money. A's wife fills up a cheque for £50 2*s*. so carelessly that room is left for the insertion of figures before the 50 and for the insertion of words before the "fifty." She then gives it to a clerk of A's to get it cashed. He writes 3 before 50, and "three hundred and" before "fifty." A's banker pays the cheque so altered in good faith. A cannot recover against the banker.[3]

(*f*) A carelessly leaves his door unlocked, whereby his goods are stolen. He is not estopped from denying the title of an innocent purchaser from the thief.[4]

ARTICLE 103.

ESTOPPEL OF TENANT AND LICENSEE.

No tenant and no person claiming through any tenant of any land or hereditament of which he has been let into possession, or for which he has paid rent, is, till he has given up possession, permitted to deny that the landlord had, at the time when the tenant was let into

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[1] Howard *v.* Hudson, 2 E. & B. 1.

[2] Knights *v.* Wiffen, L. R. 5 Q. B. 660; {McNeil *v.* Hill, Woolw. C. Ct. 96.}

[3] Young *v.* Grote, 4 Bing. 253. {See numerous cases illustrative of this point, 2 Greenl. Ev. § 172 and notes.}

[4] Per Blackburn, J., in Swan *v.* N. B. Australasian Co., 2 H. & C 181; {1 Greenl. Ev. §§ 24–27, 207.}

possession or paid the rent, a title to such land or hereditament;[1] and no person who came upon any land by the license of the person in possession thereof is, whilst he remains on it, permitted to deny that such person had a title to such possession at the time when such license was given.[2]

ARTICLE 104.

ESTOPPEL OF ACCEPTOR OF BILL OF EXCHANGE.

No acceptor of a bill of exchange is permitted to deny the signature of the drawer or his capacity to draw, or if the bill is payable to the order of the drawer, his capacity to endorse the bill, though he may deny the fact of the endorsement;[3] nor if the bill be drawn by procuration, the authority of the agent, by whom it purports to be drawn, to draw in the name of the principal,[4] though he may deny his authority to endorse it.[5]

{2 Greenl. Ev. §§ 164, 165.}

ARTICLE 105.

ESTOPPEL OF BAILEE, AGENT, AND LICENSEE.

No bailee, agent, or licensee is permitted to deny that the bailor, principal, or licensor, by whom any goods were entrusted to any of them respectively was entitled to those goods at the time when they were so entrusted.

Provided that any such bailee, agent, or licensee, may show, that he was compelled to deliver up any such goods

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[1] Doe v. Barton, 11 A. & E. 307; Doe v. Smyth, 4 M. & S. 347; Doe v. Pegg, 1 T. R. 760 (note); {5 Am. Law Rev. 1.}

[2] Doe v. Baytup, 3 A. & E. 188; {Glynn v. George, 20 N. H. 114.}

[3] Garland v. Jacomb, L. R. 8 Ex. 216.

[4] Sanderson v. Coleman, 4 M. & G. 209.

[5] Robinson v. Yarrow, 7 Tau. 455.

to some person who had a right to them as against his bailor, principal, or licensor, or that his bailor, principal, or licensor, wrongfully and without notice to the bailee, agent, or licensee, obtained the goods from a third person who has claimed them from such bailee, agent, or licensee.[1]

Every bill of lading in the hands of a consignee or endorsee for valuable consideration, representing goods to have been shipped on board a vessel, is conclusive proof of that shipment as against the master or other person signing the same, notwithstanding that such goods or some part thereof may not have been so shipped, unless such holder of the bill of lading had actual notice at the time of receiving the same that the goods had not been in fact laden on board, provided that the master or other person so signing may exonerate himself in respect of such misrepresentation by showing that it was caused without any default on his part, and wholly by the fraud of the shipper or of the holder, or some person under whom the holder holds.[2]

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[1] Dixon *v.* Hammond, 2 B. & A. 313; Crossley *v.* Dixon, 10 H. L. C. 293; Gosling *v.* Birnie, 7 Bing. 339; Hardman *v.* Wilcock, 9 Bing. 382; Biddle *v.* Bond, 34 L. J. Q. B. 137; Wilson *v.* Anderton, 1 B. & Ad. 450. {Sinclair *v.* Murphy, 14 Mich. 392; Osgood *v.* Nichols, 5 Gray (Mass.), 420; Kinsman *v.* Parkhurst, 18 How. (U. S.) 289; Dezell *v.* Odell, 3 Hill (N. Y.), 215.} As to carriers, see Sheridan *v.* New Quay, 4 C. B. N. S. 618.

[2] 18 & 19 Vict. c. 111, s. 3. {The law received and acted upon in this country holds the master bound by all statements by him made relative to matters about which he knows, or ought to know. This limitation is, perhaps, equivalent to the words in the statute, "without any default on his part." Sears *v.* Wingate, 3 Allen (Mass.), 103. See, also, as to how far a bill of lading may be explained, Angell on Carriers (5th ed.), § 231, n., where the cases are collected. See also Relyea *v.* New Haven, &c. Co., 42 Conn. 577; per Shipman, J., U. S. Dist. Ct.; 1 Greenl. Ev. § 305.}

CHAPTER XV.

OF THE COMPETENCY OF WITNESSES.*

ARTICLE 106.

WHO MAY TESTIFY.

ALL persons are competent to testify in all cases except as hereinafter excepted.

ARTICLE 107.†

WHAT WITNESSES ARE INCOMPETENT.

A witness is incompetent if in the opinion of the judge he is prevented by extreme youth, disease affecting his mind, or any other cause of the same kind, from recollecting the matter on which he is to testify, from understanding the questions put to him, from giving rational answers to those questions, or from knowing that he ought to speak the truth.

{1 Greenl. Ev. §§ 365–370. The limitation to causes of the "same kind" seems to be too strict. It matters not from what cause the defect of understanding arises. Intoxication incapacitates. 1 Greenl. Ev. § 365.}

A witness unable to speak or hear is not incompetent, but may give his evidence by writing or by signs, or in any other manner in which he can make it intelligible; but such writing must be written and such signs made in open Court. Evidence so given is deemed to be oral evidence.

{A being at the point of death, and conscious of her condition, but unable to speak articulately, was asked whether it was B who

* See Appendix, Note XXXIX. † See Appendix, Note XL.

injured her, and, if so, requested to squeeze the hand of the interrogator. She thereupon squeezed his hand. These facts were held admissible against C; the departure from the ordinary rules of evidence being justified by necessity. Com. *v.* Casey, 11 Cush. (Mass.) 417. The mode of testifying is subject to the discretion of the Court. Morrison *v.* Leonard, 3 C. & P. 127; Snyder *v.* Nations, 5 Blackf. (Ind.) 295; State *v.* De Wolf, 8 Conn. 93.}

ARTICLE 108.*

COMPETENCY IN CRIMINAL CASES.

In criminal cases the accused person and his or her wife or husband, and every person and the wife or husband of every person jointly indicted with him is incompetent to testify.[1]

{This old doctrine of the common law has been very generally, if not universally, abrogated in this country by statute.}

Provided that in any criminal proceeding against a husband or wife for any bodily injury or violence inflicted upon his or her wife or husband, such wife or husband is competent and compellable to testify.[2]

Proceedings at law on the Revenue side of the Exchequer Division of the High Court of Justice are not criminal within the meaning of this article.[3]

ARTICLE 109.

COMPETENCY IN PROCEEDINGS RELATING TO ADULTERY.

In proceedings instituted in consequence of adultery, the parties and their husbands and wives are competent witnesses, provided that no witness in any [?such] pro-

* See Appendix, Note XLI.

[1] R. *v.* Payne, L. R. 1 C. C. R. 349, and R. *v.* Thompson, id. 377.

[2] Reeve *v.* Wood, 5 B. & S. 364. Treason has been also supposed to form an exemption. See T. E. s. 1237.

[3] 28 & 29 Vict. c. 104, s. 34.

ceeding, whether a party to the suit or not, is liable to be asked or bound to answer any question tending to show that he or she has been guilty of adultery, unless such witness has already given evidence in the same proceeding in disproof of his or her alleged adultery.[1]

ARTICLE 110.

COMMUNICATIONS DURING MARRIAGE.

No husband is compellable to disclose any communication made to him by his wife during the marriage, and no wife is compellable to disclose any communication made to her by her husband during the marriage.[2]

ARTICLE 111.*

JUDGES AND ADVOCATES PRIVILEGED AS TO CERTAIN QUESTIONS.

It is doubtful whether a judge is compellable to testify as to any thing which came to his knowledge in court as such judge.[3] It seems that a barrister cannot be compelled to testify as to what he said in court in his character of a barrister.[4]

{Probably neither branch of this proposition is law in this country. Huff *v.* Bennett, 4 Sandf. (N. Y.) 120; Schall *v.* Miller, 5 Whart. (Pa.) 156. See also 1 Greenl. Ev. § 168, n., by Judge Redfield.}

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* See Appendix, Note XLII.

[1] 32 & 33 Vict. c. 68, s. 3. The word "such" seems to have been omitted accidentally. {This is in abrogation of the common law, and the same point is variously regulated by statute. See Tilton *v.* Beecher, N. Y. Pamphlet, 1875.}

[2] 16 & 17 Vict. c. 83, s. 3. It is doubtful whether this would apply to a widower or divorced person, questioned after the dissolution of the marriage as to what had been communicated to him whilst it lasted. {By the common-law of this country, the prohibition operates after the dissolution of the marriage. 1 Greenl. Ev. § 254.}

[3] R. *v.* Gazard, 8 C. & P. 595.

[4] Curry *v.* Walter, 1 Esp. 456.

ARTICLE 112.

EVIDENCE AS TO AFFAIRS OF STATE.

No one can be compelled to give evidence relating to any affairs of State, or as to official communications between public officers upon public affairs, except with the permission of the officer at the head of the department concerned,[1] or to give evidence of what took place in either House of Parliament, without the leave of the House, though he may state that a particular person acted as Speaker.[2]

{1 Greenl. Ev. § 250.}

ARTICLE 113.

INFORMATION AS TO COMMISSION OF OFFENCES.

In cases in which the government is immediately concerned no witness can be compelled to answer any question, the answer to which would tend to discover the names of persons by or to whom information was given as to the commission of offences.

In ordinary criminal prosecutions it is for the judge to decide whether the permission of any such question would or would not, under the circumstances of the particular case, be injurious to the administration of justice.[3]

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[1] Beatson *v.* Skene, 5 H. & N. 838.

[2] Chubb *v.* Salomons, 3 Car. & Kir. 77; Plunkett *v.* Cobbett, 5 Esp. 136.

[3] R. *v.* Hardy, 24 S. T. 811; A. G. *v.* Bryant, 15 M. & W. 169; R. *v.* Richardson, 3 F. & F. 693; {United States *v.* Moses, 4 Wash. C. Ct. 726; Worthington *v.* Scribner, 109 Mass. 487, where the question is discussed in the light of all the cases bearing upon the subject.}

ARTICLE 114.

COMPETENCY OF JURORS.

A petty juror may not[1] and it is doubtful whether a grand juror may[2] give evidence as to what passed between the jurymen in the discharge of their duties. It is also doubtful whether a grand juror may give evidence as to what any witness said when examined before the grand jury.

ARTICLE 115.*

PROFESSIONAL COMMUNICATIONS.

No legal adviser is permitted, whether during or after the termination of his employment as such, unless with his client's express consent, to disclose any communication, oral or documentary, made to him as such legal adviser, by or on behalf of his client, during, in the course, and for the purpose of his employment, whether in reference to any matter as to which a dispute has arisen or otherwise, or to disclose any advice given by him to his client during, in the course, and for the purpose of such employment. It is immaterial whether the client is or is not a party to the action in which the question is put to the legal adviser.

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* See Appendix, Note XLIII.

[1] Vaise *v.* Delaval, 1 T. R. 11; Burgess *v.* Langley, 5 M. & G. 722. {It may be doubtful if this should not be limited to testimony as to their own misconduct, offered for the purpose of vitiating their proceedings. 1 Greenl. Ev. § 252*a*.}

[2] 1 Ph. Ev. 140; T. E. s. 863. {Grand jurors may testify as to what a witness testified to before them, Com. *v.* Mead, 12 Gray (Mass.), 166; and to all matters which public policy does not require to be kept secret, Ibid. In some States, the statutes expressly provide they may testify to certain facts. See N. Y. Ev. Code, §§ 267, 268.}

This article does not extend to —

(1) Any such communication as aforesaid made in furtherance of any criminal purpose;[1]

(2) Any fact observed by any legal adviser, in the course of his employment as such, showing that any crime or fraud has been committed since the commencement of his employment, whether his attention was directed to such fact by or on behalf of his client or not;

(3) Any fact with which such legal adviser became acquainted otherwise than in his character as such. The expression "legal adviser" includes barristers and solicitors,[2] their clerks,[3] and interpreters between them and their clients.

Illustrations.

(*a*) A, being charged with embezzlement, retains B, a barrister, to defend him. In the course of the proceedings, B observes that an entry has been made in A's account book, charging A with the sum said to have been embezzled, which entry was not in the book at the commencement of B's employment.

This being a fact observed by B in the course of his employment, showing that a fraud has been committed since the commencement of the proceedings, is not protected from disclosure in a subsequent action by A against the prosecutor in the original case for malicious prosecution.[4]

(*b*) A retains B, an attorney, to prosecute C (whose property he

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[1] Follett *v.* Jefferyes, 1 Sim. N. S. 17; Charlton *v.* Coombes, 32 L. J. Ch. 284. These cases put the rule on the principle, that the furtherance of a criminal purpose can never be part of a legal adviser's business. As soon as a legal adviser takes part in preparing for a crime, he ceases to act as a lawyer and becomes a criminal, — a conspirator or accessory as the case may be. {Bank of Utica *v.* Mersereau, 3 Barb. (N. Y.) Ch. 528; People *v.* Sheriff, 29 Barb. (N. Y.) 627. Nor will advice how to evade the law be protected.}

[2] Wilson *v.* Rastall, 4 T. R. 753. As to interpreters, id. 756.

[3] Taylor *v.* Foster, 2 C. & P. 195; Foote *v.* Hayne, 1 C. & P. 545. Quære, whether licensed conveyancers are within the rule? Parke, B., in Turquand *v.* Knight, 7 M. & W. 100, thought not. Special pleaders would seem to be on the same footing.

[4] Brown *v.* Foster, 1 H. & N. 736.

had fraudulently acquired) for murder, and says, "It is not proper for me to appear in the prosecution for fear of its hurting me in the cause coming on between myself and him; but I do not care if I give £10,000 to get him hanged, for then I shall be easy in my title and estate." This communication is not privileged.[1]

{The protection extends to communications believed by the client to be necessary to his case, Cleave *v.* Jones, 7 Exch. 421; Aiken *v.* Kilbune, 14 Shep. (Me.) 252; or made to an attorney believed to be retained in the case, Sargent *v.* Hampden, 38 Me. 581; Foster *v.* Hall, 12 Pick. (Mass.) 89; but not if made to a person not an attorney, though supposed to be by the client, Sample *v.* Frost, 10 Iowa, 266; Barnes *v.* Harris, 7 Cush. (Mass.) 596.

If the attorney acts for several clients in the same matter, the consent of all must be had. Doe *v.* Watkins, 3 Bing. N. C. 421; Bank of Utica *v.* Mersereau, 3 Barb. Ch. 528. What the attorney sees as well as what he hears, if learned in the same confidential way, as, for instance, the destruction of an instrument, is also protected. Robson *v.* Kemp, 5 Esp. 52.

If the attorney is jointly interested with his client as a party, as he does not derive his information solely by his professional relation, the communications are not protected. Greenough *v.* Gaskell, 1 M. & K. 103; Jeanes *v.* Fridenburgh, 5 Penn. L. J. 65.

So, if he makes himself a subscribing witness to an instrument, he must testify to whatever such a witness may be required to testify to. See 1 Greenl. Ev. §§ 237–246.}

ARTICLE 116.

CONFIDENTIAL COMMUNICATIONS WITH LEGAL ADVISERS.

No one can be compelled to disclose to the Court any communication between himself and his legal adviser, which his legal adviser could not disclose without his permission, although it may have been made before any dispute arose as to the matter referred to.[2]

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[1] Annesley *v.* Anglesea, 17 S. T. 1223–1224.

[2] Minet *v.* Morgan, L. R. 8 Ch. App. 361, reviewing all the cases, and adopting the explanation given in Pearse *v.* Pearse, 1 De G. & S. 18–31, of Radcliffe *v.* Fursman, 2 Br. P. C. 514; {and modifying Bolton *v.* Liverpool, 1 M. & K. 88, so far as it is to the contrary. 1 Greenl. Ev. § 240. The rule is the same when a party testifies in

ARTICLE 117.*

CLERGYMEN AND MEDICAL MEN.

Medical men[1] and [probably] clergymen may be compelled to disclose communications made to them in professional confidence.

{In some States in this country, communications made to a medical man or a clergyman, not for an unlawful purpose, are protected. Johnson *v.* Johnson, 14 Wend. (N. Y.) 637; 1 Greenl. Ev. §§ 247, 248.}

ARTICLE 118.

PRODUCTION OF TITLE-DEEDS OF WITNESS NOT A PARTY.

No witness who is not a party to a suit can be compelled to produce his title-deeds to any property,[2] or any document the production of which might tend to criminate him, or expose him to any penalty or forfeiture;[3] but a witness is not entitled to refuse to produce a document in his possession only because its production may expose him to a civil action,[4] or because he has a lien upon it.[5]

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* See Appendix, Note XLIV.

his own case, and calls his counsel also as a witness, but neither is examined or cross-examined in regard to the subject-matter of confidential communication. Montgomery *v.* Pickering, 116 Mass. 227.}

[1] Duchess of Kingston's Case, 20 S. T. 572–573. As to clergymen, see Appendix, Note XLIV.

[2] Pickering *v.* Noyes, 1 B. & C. 263; Adams *v.* Lloyd, 3 H. & N. 351. {This rule we believe to be peculiar to England. In this country, a witness, not a party, may be compelled to produce any of his private papers. Whether the Court, on inspection, will require them to be put in evidence, may be a matter of discretion. Burnham *v.* Morrissey, 14 Gray (Mass.), 226; 1 Greenl. Ev. § 246.}

[3] Whitaker *v.* Izod, 2 Tau. 115; {1 Greenl. Ev. §§ 451, 453.}

[4] Doe *v.* Date, 3 Q. B. 609, 618; {1 Greenl. Ev. § 452.}

[5] Hope *v.* Liddell, 7 De G. M. & G. 331; Hunter *v.* Leathley, 10 B. & C. 858; Brassington *v.* Brassington, 1 Si. & Stu. 455. It has

No bank is compellable to produce the books of such bank in any legal proceeding, unless a judge of the High Court specially orders that such books are to be produced at such proceeding.[1]

ARTICLE 119.

PRODUCTION OF DOCUMENTS WHICH ANOTHER PERSON, HAVING POSSESSION, COULD REFUSE TO PRODUCE.

No solicitor,[2] trustee, or mortgagee can be compelled to produce (except for the purpose of identification) documents in his possession as such, which his client, *cestui que trust*, or mortgagor would be entitled to refuse to produce if they were in his possession; nor can any one who is entitled to refuse to produce a document be compelled to give oral evidence of its contents.[3]

ARTICLE 120.

WITNESS NOT TO BE COMPELLED TO CRIMINATE HIMSELF

No one is bound to answer any question if the answer thereto would, in the opinion of the judge, have a ten-

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been doubted whether production may not be refused on the ground of a lien as against the party requiring the production. This is suggested in Brassington *v.* Brassington, and was acted upon by Lord Denman, in Kemp *v.* King, 2 Mo. & Ro. 437; but it seems to be opposed to Hunter *v.* Leathley, in which a broker who had a lien on a policy for premiums advanced was compelled to produce it in an action against the underwriter by the assured who had created the lien. See Ley *v.* Barlow (Judgt. of Parke, B.), 1 Ex. 801. {The Court will determine whether the claim of a lien shall be recognized or not. Bull *v.* Loveland, 10 Pick. (Mass.) 14.}

[1] 39 & 40 Vict. c. 48, s. 8. "Books" includes ledgers, day-books, cash-books, and other account-books. "Legal proceedings" includes all proceedings mentioned in article 36. "Bank" is also defined so as to include all sorts of banks.

[2] Volant *v.* Soyer, 13 C. B. 231; Phelps *v.* Prew, 8 E. & B. 431; {1 Greenl. Ev. § 246.}

[3] Davies *v.* Waters, 9 M. & W. 608; Few *v.* Guppy, 13 Beav. 454.

dency to expose the witness [or the wife or husband of the witness] to any criminal charge, or to any penalty or forfeiture which the judge regards as reasonably likely to be preferred or sued for;[1] but no one is excused from

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[1] R. *v.* Boyes, 1 B. & S. 330; {1 Greenl. Ev. §§ 451, 453.} As to husbands and wives, see 1 Hale, P. C. 301; R. *v.* Cliviger, 2 T. R. 263; Cartwright *v.* Green, 8 Ve. 405; R. *v.* Bathwick, 2 B. & Ad. 639; R. *v.* All Saints, Worcester, 6 M. & S. 194. These cases show that even under the old law which made the parties and their husbands and wives incompetent witnesses, a wife was not incompetent to prove matter which might tend to criminate her husband. R. *v.* Cliviger assumes that she was, and was to that extent overruled. As to the later law, see R. *v.* Halliday, Bell, 257. The cases, however, do not decide that if the wife claimed the privilege of not answering she would be compelled to do so, and to some extent they suggest that she would not. {Reg. *v.* Boyes seems to have settled the law in England that the judge, and not the witness, is to decide whether the answer will tend to criminate; or, at least, that the oath of the witness, that he believes it will tend to criminate, will not justify him in refusing to answer, unless the Court can see some appreciable danger of prosecution. The bare possibility of legal peril is not a justification of silence. The fair result of the American cases seems to be that the witness's opinion is to prevail, unless the Court can see that it is not well founded. Janvrin *v.* Scammon, 29 N. H. 280; People *v.* Mather, 4 Wend. (N. Y.) 229; Burr's Trial, vol. i. p. 245; Chamberlin *v.* Wilson, 12 Vt. 491. Though some of the cases seem to leave the matter absolutely to the determination of the witness. Warner *v.* Lucas, 10 Ohio, 336; Poole *v.* Perritt, 1 Speers (S. C.), 128. A defendant in equity cannot refuse to discover, on the ground that the discovery will expose him to a penalty. Scott *v.* Miller, 1 Johns. Ch. 328. If a defendant in a criminal case avails himself of the right, given him by statute, to take the stand as a witness in his own behalf, he cannot refuse to answer, on the ground that by answering he may criminate himself. By availing himself of the privilege of testifying in his own behalf, he waives his other privilege of not being obliged to furnish evidence against himself. Com. *v.* Morgan, 107 Mass. 199; Stover *v.* People, 56 N. Y. 315; State *v.* Ober, 52 N. H. 459. If the wife be permitted by statute to testify in behalf of her husband in a civil case, she may be required, on cross-examination, to testify against him. Balentine *v.* White, 77 Pa. St. 20. But though a witness will not be compelled to answer questions the answers to which

answering any question only because the answer may establish or tend to establish that he owes a debt, or is otherwise liable to any civil suit, either at the instance of the Crown or of any other person.[1]

ARTICLE 121.

CORROBORATION, WHEN REQUIRED.

No plaintiff in any action for breach of promise of marriage can recover a verdict, unless his or her testimony is corroborated by some other material evidence in support of such promise.[2]

No order against any person alleged to be the father

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may criminate him, the question may be asked wherever the answer, if the witness should waive his privilege, would be received as evidence. 1 Greenl. Ev. § 460; Best, § 546. It is discretionary with the Court whether it will advise a witness of his right to refuse to answer, on the ground that the answer will criminate him. Com. *v.* Howe, 13 Gray (Mass.), 26. And the privilege is personal. Counsel cannot be allowed to make the objection. Thomas *v.* Newton, 1 M. & Malk. 48; Com. *v.* Shaw, 4 Cush. (Mass.) 594. The more recent rule in this country is, that the husband or wife cannot divulge confidential communications between them, but may be admitted in a case between other parties as witnesses to facts tending to criminate the other, though neither can be compelled to testify to such facts. Com. *v.* Reid, 8 Phila. 609; State *v.* Briggs, 9 R. I. 361; State *v.* Dudley, 7 Wis. 664. The earlier cases held that neither husband nor wife could even in a collateral proceeding testify directly to the commission of any criminal act by the other. State *v.* Welch, 26 Me. 30; State *v.* Gardner, 1 Root (Conn.), 485; People *v.* Horton, 4 Mich. 69; Com. *v.* Sparks, 7 Allen (Mass.), 534. Compare Tilton *v.* Beecher, Abbot's Report, vol. ii. p. 48, where the common law is thoroughly discussed, and how far modified by the New York Statute of 1867. In Pennsylvania, under the Statute of 1869, giving the husband authority to call his wife as a witness, she may be compelled on cross-examination to give evidence against him. Balentine *v.* White, 77 Pa. St. 20.}

[1] 46 Geo. III. c. 37. {This statute is generally regarded in this country as declaratory of the common law. 1 Greenl. Ev. § 452.}

[2] 32 & 33 Vict. c. 68, s. 2.

of a bastard child can be made by any justices, or confirmed on appeal by any Court of Quarter Session, unless the evidence of the mother of the said bastard child is corroborated in some material particular to the satisfaction of the said justices or Court respectively.[1]

When the only proof against a person charged with a criminal offence is the evidence of an accomplice, uncorroborated in any material particular, it is the duty of the judge to warn the jury that it is unsafe to convict any person upon such evidence, though they have a legal right to do so.[2]

ARTICLE 122.

NUMBER OF WITNESSES.

In trials for high treason, or misprision of treason, no one can be indicted, tried, or attainted (unless he pleads guilty) except upon the oath of two lawful witnesses, either both of them to the same overt act, or one of them to one and another of them to another overt act of the same treason. If two or more distinct treasons of divers heads or kinds are alleged in one indictment, one witness produced to prove one of the said treasons and another witness produced to prove another of the said treasons are not to be deemed to be two witnesses to the same treason within the meaning of this article.[3]

This provision does not apply to cases of high treason in compassing or imagining the Queen's death, in which

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[1] 8 & 9 Vict. c. 10, s. 6; 35 & 36 Vict. c. 6, s. 4.

[2] 1 Ph. Ev. 93–101; T. E. ss. 887–891; 3 Russ. Cri. 600–611; {1 Greenl. Ev. § 379. This is, perhaps, the law as it is generally held in this country. But its soundness has been questioned. It seems contrary to the rights of parties that it should be the duty of a judge to disparage evidence which he is obliged to admit. State *v.* Littlefield, 58 Me. 267.}

[3] 7 & 8 Will. III. c. 3, ss. 2, 4; {1 Greenl. Ev. §§ 255, 256.}

the overt act or overt acts of such treason alleged in the indictment are assassination or killing of the Queen, or any direct attempt against her life, or any direct attempt against her person, whereby her life may be endangered or her person suffer bodily harm,[1] or to misprision of such treason.

If upon a trial for perjury the only evidence against the defendant is the oath of one witness contradicting the oath on which perjury is assigned, and if no circumstances are proved which corroborate such witness, the defendant is entitled to be acquitted.[2]

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[1] 39 & 40 Geo. III. c. 93.

[2] 3 Russ. on Crimes, 77–86; {1 Greenl. Ev. § 257.}

CHAPTER XVI.

OF TAKING ORAL EVIDENCE, AND OF THE EXAMINATION OF WITNESSES.

ARTICLE 123.

EVIDENCE TO BE UPON OATH, EXCEPT IN CERTAIN CASES.

ALL oral evidence given in any proceeding must be given upon oath, but if any person called as a witness refuses or is unwilling to be sworn from alleged conscientious motives, the judge before whom the evidence is to be taken may, upon being satisfied of the sincerity of such objection, permit such person instead of being sworn to make his or her solemn affirmation and declaration in the following words —

"I, A B, do solemnly, sincerely, and truly affirm and declare that the taking of any oath is according to my religious belief unlawful, and I do also solemnly, sincerely, and truly affirm and declare," &c.[1]

[2] If any person called to give evidence in any Court of Justice, whether in a civil or criminal proceeding, objects

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[1] 17 & 18 Vict. c. 125, s. 20 (civil cases); 24 & 25 Vict. c. 66 (criminal cases). {This is the usual form of oath in this country. Affirmations, under the pains and penalties of perjury, are admissible in most, if not all, the States.}

[2] 32 & 33 Vict. c. 68, s. 4; 33 & 34 Vict. c. 49. I omit special provisions as to Quakers, Moravians, and Separatists, as the enactments mentioned above include all cases. The statutes are referred to in T. E. s. 1254; R. N. P. 175–176. {The sanctions under which a witness shall be admitted have been extended in most, if not all, of the States by statutory enactments. This one, so far as the promise is concerned, is, so far as we are aware, peculiar to England.}

to take an oath, or is objected to as incompetent to take such an oath, such person must, if the presiding judge is satisfied that the taking of an oath would have no binding effect on his conscience, make the following promise and declaration —

"I solemnly promise and declare that the evidence given by me to the Court shall be the truth, the whole truth, and nothing but the truth."

If any person having made either of the said declarations wilfully and corruptly gives false evidence, he is liable to be punished as for perjury.

ARTICLE 124.

FORM OF OATHS; BY WHOM THEY MAY BE ADMINISTERED.

Oaths are binding which are administered in such form and with such ceremonies as the person sworn declares to be binding.[1]

Every person now or hereafter having power by law or by consent of parties to hear, receive, and examine evidence, is empowered to administer an oath to all such witnesses as are lawfully called before him.[2]

ARTICLE 125.

HOW ORAL EVIDENCE MAY BE TAKEN.

Oral evidence may be taken[3] (according to the law relating to civil and criminal procedure) —

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[1] 1 & 2 Vict. c. 105. For the old law, see Omichund *v.* Barker, 1 S. L. C. 455; {1 Greenl. Ev. § 328; Fuller *v.* Fuller 17 Cal. 605.}

[2] 14 & 15 Vict. c. 99, s. 16. {A similar statute exists in Massachusetts, and doubtless in other States.}

[3] As to civil procedure, see Order XXXVII. to Judicature Act of 1875: Wilson, pp. 264–267. As to criminal procedure, see 11 & 12 Vict. c. 42, for preliminary procedure, and the rest of this chapter for final hearings.

In open court upon a final or preliminary hearing;
Or out of court for future use in court—

(*a*) upon affidavit,

(*b*) under a commission,[1]

(*c*) before any officer of the Court or any other person or persons appointed for that purpose by the Court or a judge under the Judicature Act, 1875, Order XXXVII., 4.

Oral evidence taken upon a preliminary hearing may, in the cases specified in 11 & 12 Vict. c. 42, s. 17, 30 & 31 Vict. c. 35, s. 6, and 17 & 18 Vict. c. 104, s. 270, be recorded in the form of a deposition, which deposition may be used as documentary evidence of the matter stated therein in the cases and on the conditions specified in Chapter XVII.

Oral evidence taken in open court must be taken according to the rules contained in this chapter relating to the examination of witnesses.

[2] Oral evidence taken under a commission must be taken in the manner prescribed by the terms of the commission.

[3] Oral evidence taken under (*c*) must be taken in the same manner as if it were taken in open court; but the examiner has no right to decide on the validity of objections taken to particular questions, but must record the

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[1] The law as to commissions to take evidence is as follows: The root of it is 13 Geo. III. c. 63. Section 40 of this Act provides for the issue of a commission to the Supreme Court of Calcutta (which was first established by that Act) and the corresponding authorities at Madras and Bombay to take evidence in cases of charges of misdemeanor brought against Governors, &c., in India in the Court of Queen's Bench. S. 42 applies to parliamentary proceedings, and s. 44 to civil cases in India. These provisions have been extended to all the colonies by 1 Will. IV. c. 22, and so far as they relate to civil proceedings to the world at large. 3 & 4 Vict. c. 105, gives a similar power to the Courts at Dublin.

[2] T. E. s. 491.

[3] T. E. s. 1283.

questions, the fact that they were objected to, and the answers given.

[1] Oral evidence given on affidavit must be confined to such facts as the witness is able of his own knowledge to prove, except on interlocutory motions, on which statements as to his belief and the grounds thereof may be admitted. The costs of every affidavit unnecessarily setting forth matters of hearsay or argumentative matter, or copies of or extracts from documents, must be paid by the party filing them.

[2] When a deposition, or the return to a commission, or an affidavit, or evidence taken before an examiner, is used in any court as evidence of the matter stated therein, the party against whom it is read may object to the reading of any thing therein contained on any ground on which he might have objected to its being stated by a witness examined in open court, provided that no one is entitled to object to the reading of any answer to any question asked by his own representative on the execution of a commission to take evidence.[3]

ARTICLE 126.*

EXAMINATION IN CHIEF, CROSS-EXAMINATION, AND RE-EXAMINATION.

Witnesses examined in open court must be first examined in chief, then cross-examined, and then re-examined.

Whenever any witness has been examined in chief, or has been intentionally sworn, or has made a promise and declaration as hereinbefore mentioned for the purpose of

* See Appendix, Note XLV.

[1] Judicature Act, 1875, Order XXXVII., 4.

[2] T. E. s. 491; Hutchinson *v.* Bernard, 2 Moo. & Rob. 1.

[3] {The several provisions of this article refer to matters of practice, which are presumed to be generally similar in the different jurisdictions of this country. The particular differences would hardly find an appropriate place in this treatise.}

giving evidence,[1] the opposite party has a right to cross-examine him; but the opposite party is not entitled to cross-examine merely because a witness has been called to produce a document on a *subpœna duces tecum*, or in order to be identified. After the cross-examination is concluded, the party who called the witness has a right to re-examine him.

The Court may in all cases permit a witness to be recalled either for further examination in chief or for further cross-examination, and if it does so, the parties have the right of further cross-examination and further re-examination respectively.[2]

If a witness dies, or becomes incapable of being further examined at any stage of his examination, the evidence given before he became incapable is good.[3]

If in the course of a trial a witness who was supposed to be competent appears to be incompetent, his evidence may be withdrawn from the jury, and the case may be left to their decision independently of it.[4]

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[1] {This provision, as has been before noted, is peculiar to the English practice.}

[2] {The judge may recall a witness at any stage of the proceedings, and examine or cross-examine at his discretion, Rex *v.* Watson, 6 C. & P. 653; may or may not, at his discretion, advise a witness of his right to refuse to answer, Com. *v.* Howe, 13 Gray (Mass.), 26; may limit the number of impeaching or supporting witnesses, Bunnell *v.* Butler, 23 Conn. 65; may, at a preliminary hearing to determine whether the conditions exist upon which evidence offered becomes admissible, refuse to permit cross-examination, Com. *v.* Morrell, 99 Mass. 542; and may limit the cross-examination upon facts otherwise immaterial, for the purpose of testing the witness's bias, credibility, and judgment, Com. *v.* Lyden, 113 Mass. 452.}

[3] R. *v.* Doolin, 1 Jebb, C. C. 123; {1 Greenl. Ev. § 163 *et seq.* The rule is the same with reference to the evidence of a deceased party. Pratt *v.* Patterson, Sup. Ct. Pa., 3 L. & Eq. Reptr. 45.} The judges compared the case to that of a dying declaration, which is admitted though there can be no cross-examination.

[4] R. *v.* Whitehead, L. R. 1 C. C. R. 33; {1 Greenl. Ev. § 51*a*; Roberts *v.* Johnson, 58 N. Y. 614.}

ARTICLE 127.

TO WHAT MATTERS CROSS-EXAMINATION AND RE-EXAMINATION MUST BE DIRECTED.

The examination and cross-examination must relate to facts in issue or relevant or deemed to be relevant thereto, but the cross-examination need not be confined to the facts to which the witness testified on his examination in chief.

{The practice in the United States Courts, and perhaps a majority of the State Courts, is to confine the cross-examination to facts testified to in chief. 1 Greenl. Ev. § 445.}

The re-examination must be directed to the explanation of matters referred to in cross-examination; and if new matter is, by permission of the Court, introduced in re-examination, the adverse party may further cross-examine upon that matter.

ARTICLE 128.

LEADING QUESTIONS.

Questions suggesting the answer which the person putting the question wishes or expects to receive, or suggesting disputed facts as to which the witness is to testify, must not, if objected to by the adverse party, be asked in an examination in chief, or a re-examination, except with the permission of the Court, but such questions may be asked in cross-examination.

{1 Greenl. Ev. § 434. Where a party calls his adversary as a witness, he may cross-examine him by statute. Brubaker *v.* Taylor, 76 Pa. St. 83. This statute is but a confirmation of the common-law right of a judge to cross-examine a witness who appears to be adverse. Rea *v.* Missouri, Int. Rev. Record, March 21, 1874.}

ARTICLE 129.*

QUESTIONS LAWFUL IN CROSS-EXAMINATION.

When a witness is cross-examined, he may, in addition to the questions hereinbefore referred to, be asked any questions which tend —

(1) To test his accuracy, veracity, or credibility; or

(2) To shake his credit, by injuring his character.

{And to this end the relations of the witness to either of the parties, or to the subject-matter in dispute; his interest, his motives, his way of life, his associations, his habits, his prejudices, his physical defects and infirmities, his mental idiosyncrasies, if they affect his capacity; his means of knowledge, and powers of discernment, memory, and description, — may all be relevant. 1 Greenl. Ev. § 446. But it is said that questions otherwise irrelevant cannot be allowed for the purpose of testing the moral sense of the witness. Com. *v.* Shaw, 4 Cush. (Mass.) 593.}

He may be compelled to answer any such question, however irrelevant it may be to the facts in issue, and however disgraceful the answer may be to himself, except in the case provided for in article 120.

{1 Greenl. Ev. § 456.}

Illustration.

(*a*) The question is, whether A committed perjury in swearing that he was R. T. B deposes that he made tattoo marks on the arm of R. T., which at the time of the trial were not, and never had been, on the arm of A. B may be asked and compelled to answer the question whether, many years after the alleged tattooing, and many years before the occasion on which he was examined, he committed adultery with the wife of one of his friends.[1]

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* See Appendix, Note XLVI.

[1] R. *v.* Orton. See summing-up of Cockburn, C. J., vol. ii. p. 719, &c. {In this case the Lord Chief Justice, if such a question is to be admitted or rejected at the discretion of the judge, carried that discretion to its extremest limits. This and other modern cases show a tendency, no doubt, towards great liberality of cross-examination

ARTICLE 130.

EXCLUSION OF EVIDENCE TO CONTRADICT ANSWERS TO QUESTIONS TESTING VERACITY.

When a witness under cross-examination has been asked and has answered any question which is relevant to the inquiry only in so far as it tends to shake his credit by injuring his character, no evidence can be given to contradict him except in the following cases:[1] —

(1) If a witness is asked whether he has been previously convicted of any felony or misdemeanor, and denies or does not admit it, or refuses to answer, evidence may be given of his previous conviction thereof.[2]

(2) If a witness is asked any question tending to show that he is not impartial, and answers it by denying the facts suggested, he may be contradicted.[3]

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for the purpose of ascertaining who and what the witness is. People *v.* Manning, 48 Cal. 335; Wilbur *v.* Flood, 16 Mich. 40; Taylor, Ev. §§ 1314–15. But see Alb. L. J. vol. xiv. p. 281; Davenport *v.* Ledger, 80 Ill. 574. In New York, the witness cannot be asked if he has been convicted of a particular offence, as there is better evidence if the fact be so, Newcomb *v.* Griswold, 24 N. Y. 298; but he may be asked if he has been in the State prison, and how long, as of that he must know, Real *v.* People, 42 N. Y. 270; but the general rule has been, both in England and this country, that questions as to matters collateral, irrelevant, and not material to the issue, the witness is not bound to answer, 1 Greenl. Ev. § 455.}

[1] A. G. *v.* Hitchcock, 1 Ex. 91, 99–105. See, too, Palmer *v.* Trower, 8 Ex. 247.

[2] 28 & 29 Vict. c. 18, s. 6. {In this country, the conviction can only be shown by record, if objection be made to other evidence. Newcomb *v.* Griswold, 24 N. Y. 298; Com. *v.* Bonner, 97 Mass. 587; 1 Greenl. Ev. § 457. And where the witness is asked as to his conduct in collateral and irrelevant matters, with a view to discredit him, his answer cannot be contradicted. 1 Greenl. Ev. § 449.}

[3] A. G. *v.* Hitchcock, 1 Ex. 91, pp. 100, 105; {Beardsley *v.* Weldman, 41 Conn. 515; 1 Greenl. Ev. § 450; Com. *v.* Lyden, 113 Mass. 452.}

ARTICLE 131.*

STATEMENTS INCONSISTENT WITH PRESENT TESTIMONY MAY BE PROVED.

Every witness under cross-examination in any proceeding, civil or criminal, may be asked whether he has made any former statement relative to the subject-matter of the action and inconsistent with his present testimony, the circumstances of the supposed statement being referred to sufficiently to designate the particular occasion, and if he does not distinctly admit that he has made such a statement, proof may be given that he did in fact make it.

{ This was the rule established in the Queen's Case, 2 B. & B. 313; and this rule is followed in the United States Courts, Conrad *v.* Griffey, 16 How. (U. S.) 38; and in the Courts of the States generally, Smith *v.* People, 2 Mich. 415; Galena R. R. Co. *v.* Fay, 16 Ill. 558; Carlisle *v.* Hunley, 16 Ala. 622; Jarboe *v.* Kepler, 8 Ind. 314; Wright *v.* Hicks, 15 Ga. 160; Unis *v.* Charlton, 12 Gratt. (Va.) 484; Ketchingman *v.* State, 6 Wis. 426; Drennen *v.* Lindsey, 15 Ark. 359; Patchin *v.* Astor Ins. Co., 13 N. Y. 268; Brubaker *v.* Taylor, 76 Pa. St. 83. But in some of the States, — Tucker *v.* Welch, 17 Mass. 160; Robinson *v.* Hutchinson, 31 Vt. 443; Hedge *v.* Clapp, 22 Conn. 622; Cook *v.* Brown, 34 N. H. 460; Ware *v.* Ware, 8 Greenl. (Me.) 42; State *v.* Sagen, 58 Mo. 585, — no preliminary inquiry is required.

Corroboration by showing prior similar statements. — Proof of declarations made by a witness out of Court in corroboration of the testimony given by him at the trial, is, as a general rule, inadmissible. But when a witness is charged with having been actuated by some motive, prompting him to a false statement, or that the story is a recent fabrication, it may be shown that he made similar statements before any such motive existed, or when self-interest would have tempted him to make a different statement, and before he could foresee what kind of evidence to fabricate. Stolp *v.* Blair, 68 Ill. 514; People *v.* Doyell, 48 Cal. 85; Conrad *v.* Griffey, 11 How. (U. S.) 480; Rob *v.* Hackley, 23 Wend. (N. Y.) 50; Gibbs *v.* Tinsley, 13 Vt. 208.

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* See Appendix, Note XLVII.

In Maryland, Pennsylvania, and Indiana, the earlier cases follow the rule, that such statements are admissible, laid down in Luttrell *v.* Regnall, 1 Mod. 282, — long since overruled; and it may be doubted if now in either State the Courts would be bound by the earlier cases, unless the facts were exactly coincident. See Maitland *v.* Citizens' Nat. Bank, 40 Me. 540.

In Massachusetts, it has been held that the rule excluding such declarations is confined to the examination in chief; and, when the purpose of cross-examination is to impeach, such declarations are to be admitted. The question in this case insinuated fabrication; and so, upon the facts, the case is in harmony with the general rule. What is said beyond this seems to have been *obiter*. Com. *v.* Wilson, 1 Gray (Mass.), 340.

The proof of a refusal by the plaintiff, in a suit against a town for injuries caused by a defective highway, to submit to a personal examination, the object being to argue from the fact of refusal that the injury was less than is pretended, may be rebutted by proof of a prior offer to submit to such examination. Durgin *v.* Danville, 47 Vt. 95.}

The same course may be taken with a witness upon his examination in chief, if the judge is of opinion that he is [hostile] to the party by whom he was called and permits the question.

{This is so now by statute in England, see Appendix, Note XLVIII., *post;* and there seems to be no good reason why such proof may not be given whether the judge be of opinion that the witness be "hostile" or not, Am. L. Rev., vol. xi. p. 261. But unless by statute in some of the States, — Gen. Stat. Mass., 1869, c. 425, for instance, which is substantially a reproduction of the English statute, — such evidence has not generally been regarded as admissible in this country, Coulter *v.* Am. Exp. Co., 56 N. Y. 585; People *v.* Jacobs, 49 Cal. 384; Com. *v.* Welch, 4 Gray (Mass.), 535; the sole effect being to discredit 1 Greenl. Ev. §§ 442–444. But if the purpose be to satisfy the witness that he is in error, and to get him to correct it, and not to discredit him, it is said to be admissible. Bullard *v.* Pearsall, 53 N. Y. 230; Melhuish *v.* Collier, 15 Ad. & El. 378; 1 Greenl. Ev. § 444, n. It has always been competent to show the truth of any allegation by other witnesses, though they may contradict one already called. Greenough *v.* Eccles, 5 C. B. N. S. 786; People *v.* Safford, 5 Denio (N. Y.), 112; 1 Greenl. Ev. § 443, n.

ARTICLE 132.

CROSS-EXAMINATION AS TO PREVIOUS STATEMENTS IN WRITING.

A witness under cross-examination [or a witness whom the judge under the provisions of article 131 has permitted to be examined by the party who called him as to previous statements inconsistent with his present testimony] may be questioned as to previous statements made by him in writing, or reduced into writing, relative to the subject-matter of the cause, without such writing being shown to him [or being proved in the first instance]; but if it is intended to contradict him by the writing, his attention must, before such contradictory proof can be given, be called to those parts of the writing which are to be used for the purpose of contradicting him. The judge may, at any time during the trial, require the document to be produced for his inspection, and may thereupon make such use of it for the purposes of the trial as he thinks fit.[1]

ARTICLE 133.

IMPEACHING CREDIT OF WITNESS.

The credit of any witness may be impeached by the adverse party, by the evidence of persons who swear that they, from their knowledge of the witness, believe him to be unworthy of credit upon his oath. Such persons may not upon their examination in chief give

[1] 17 & 18 Vict. c. 125, s. 24; and 28 Vict. c. 18, s. 5. I think the words between brackets represent the meaning of the sections, but in terms they apply only to witnesses under cross-examination — "Witnesses may be cross-examined," &c. {This statute modifies the common law, which requires that the paper shall be shown to the witness. 1 Greenl. Ev. §§ 462–466.}

reasons for their belief, but they may be asked their reasons in cross-examination, and their answers cannot be contradicted.[1]

No such evidence may be given by the party by whom any witness is called,[2] but, when such evidence is given by the adverse party, the party who called the witness may give evidence in reply to show that the witness is worthy of credit.[3]

ARTICLE 134.

OFFENCES AGAINST WOMEN.

When a man is prosecuted for rape or an attempt to ravish, it may be shown that the woman against whom the offence was committed was of a generally immoral character, although she is not cross-examined on the subject.[4] The woman may in such a case be asked whether she has had connection with other men, but her answer

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[1] 2 Ph. Ev. 503–504; T. E. ss. 1324–1325. {Although it is said (1 Greenl. Ev. § 461) that the weight of authority in this country is against allowing the impeaching witness to state his opinion of the credibility of the impeached witness, it seems that later discussion has shifted that weight — if it ever was the other way — in favor of the English rule. See Hamilton *v.* People, 29 Mich. 173, where the question is very carefully considered. See also, in addition to the cases cited in the opinion, State *v.* Stallings, 2 Hayw. (Ky.) 300; State *v.* Boswell, 2 Dev. (N. C.) 209. The inquiry is generally restricted in this country to the witness's character for truth. Craig *v.* State, 5 Ohio, N. S. 605; Quinsigamond Bank *v.* Hobbs, 11 Gray (Mass.), 250; Shaw *v.* Emery, 42 Me. 569; 3 Am. Law Jour. N. S. 154. But in some States it may include his general character. Anon., 1 Hill (S. C.), 251; Hume *v.* Scott, 3 A. K. Marsh. (Ky.) 261; People *v.* Mather, 4 Wend. (N. Y.) 257; State *v.* Boswell, 2 Dev. (N. C.) 209; Eason *v.* Chapman, 21 Ill. 33. And this appears to be the rule in England, Rex *v.* Bispham, 4 C. & P. 392, though perhaps not definitely settled, 2 Taylor, Ev. 1325.}

[2] 17 & 18 Vict. c. 125, s. 2; and 28 Vict. c. 18, s. 3.

[3] 2 Ph. Ev. 504.

[4] R. *v.* Clarke, 2 Star. 241; {2 Greenl. Ev. § 214, n.}

cannot be contradicted.[1] She may also be asked whether she has had connection on other occasions with the prisoner, and if she denies it she [probably] may be contradicted.[2]

ARTICLE 135.

WHAT MATTERS MAY BE PROVED IN REFERENCE TO DECLARATIONS RELEVANT UNDER ARTICLES 25–34.

Whenever any declaration or statement made by a deceased person relevant or deemed to be relevant under articles 25–33, both inclusive, or any deposition is proved, all matters may be proved in order to contradict it, or in order to impeach or confirm the credit of the person by whom it was made which might have been proved if that person had been called as a witness, and had denied upon cross-examination the truth of the matter suggested.[3]

ARTICLE 136.

REFRESHING MEMORY.

A witness may, while under examination, refresh his memory by referring to any writing made by himself at the time of the transaction concerning which he is questioned, or so soon afterwards that the judge considers it likely that the transaction was at that time fresh in his memory.

{The words in the text, "while under examination," might seem

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[1] R. *v.* Holmes, L. R. 1 C. C. R. 334. {But see 1 Greenl. Ev. § 458, n.; 2 id. § 214, n.}

[2] R. *v.* Martin, 6 C. & P. 562, and remarks in R. *v.* Holmes, p. 337, per Kelly, C. B.; {2 Greenl. Ev. § 214, n.}

[3] R. *v.* Drummond, 1 Lea. 338; R. *v.* Pike, 3 C. & P. 598. In these cases dying declarations were excluded, because the persons by whom they were made would have been incompetent as witnesses, but the principle would obviously apply to all the cases in question. {Goodall *v.* State, 1 Oregon, 333; Otterson *v.* Hofford, 36 N. J. 129; Lossee *v.* Lossee, 2 Hill (N. Y.), 609; 1 Greenl. Ev. § 163.}

to imply that the papers by which the memory is refreshed must be produced in court. But a witness may refresh his recollection before taking the stand, by reference to memoranda made by him, and his testimony is competent without the production of the memoranda, unless the paper, when produced, would be evidence of itself, and so the best evidence of the fact in dispute. Kensington *v.* Inglis, 8 East, 273; Patton *v.* Freeman, Coxe (N. J.), 113; 1 Greenl. Ev. § 437. See, on this general subject, Cowen & Hill's notes to Phillip's Evidence, Part I., Note 528. In many of the American courts the memorandum, in itself inadmissible, is permitted to go to the jury, being verified by the oath of the party making it. 1 Greenl. Ev. § 437, n., and cases there cited.}

The witness may also refer to any such writing made by any other person, and read by the witness within the time aforesaid, if when he read it he knew it to be correct.[1]

An expert may refresh his memory by reference to professional treatises.[2]

ARTICLE 137.

RIGHT OF ADVERSE PARTY AS TO WRITING USED TO REFRESH MEMORY.

Any writing referred to under article 136 must be produced and shown to the adverse party if he requires it; and such party may, if he pleases, cross-examine the witness thereupon.[3]

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[1] 2 Ph. Ev. 480, &c.; T. E. ss. 1264–1270; R. N. P. 194–195; {1 Greenl. Ev. §§ 436, 437.}

[2] Sussex Peerage Case, 11 C. & F. 114–117. {In Alabama, the treatise itself may be read as evidence. Merkle *v.* State, 37 Ala. 139. There can be little doubt that an expert may adopt the very words of a treatise in giving his opinions. But they must be his words and his opinion. Com. *v.* Wilson, 1 Gray (Mass.), 338.}

[3] See cases in R. N. P. 195; {1 Greenl. Ev. § 437.}

ARTICLE 138.

GIVING, AS EVIDENCE, DOCUMENT CALLED FOR AND PRODUCED ON NOTICE.

When a party calls for a document which he has given the other party notice to produce, and such document is produced to, and inspected by, the party calling for its production, he is bound to give it as evidence if the party producing it requires him to do so, and if it is or is deemed to be relevant.[1]

ARTICLE 139.

USING, AS EVIDENCE, A DOCUMENT, PRODUCTION OF WHICH WAS REFUSED ON NOTICE.

When a party refuses to produce a document which he has had notice to produce, he may not afterwards use the document as evidence without the consent of the other party.[2]

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[1] Wharam *v.* Routledge, 1 Esp. 235; Calvert *v.* Flower, 7 C. & P. 886. {This is the general but not uniform rule in this country. 1 Greenl. Ev. § 563.}

[2] Doe *v.* Hodgson, 12 A. & E. 135; {Bogart *v.* Brown, 5 Pick. (Mass.) 18;} but see remarks in 2 Ph. Ev. 270.

CHAPTER XVII.

OF DEPOSITIONS.[1]

ARTICLE 140.

DEPOSITIONS BEFORE MAGISTRATES.

A DEPOSITION taken under 11 & 12 Vict. c. 42, s. 17, may be produced and given in evidence at the trial of the person against whom it was taken,

if it is proved [to the satisfaction of the judge] that the witness is dead, or so ill as not to be able to travel [although there may be a prospect of his recovery];[2]

[or, if he is kept out of the way by the person accused][3]

or [probably if he is too mad to testify],[4] and

if the deposition purports to be signed by the justice by or before whom it purports to have been taken; and

if it is proved by the person who offers it as evidence that it was taken in the presence of the person accused, and that he, his counsel, or attorney, had a full opportunity of cross-examining the witness;

Unless it is proved that the deposition was not in fact signed by the justice by whom it purports to be signed

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[1] {This chapter contains what is, and what the author thinks ought to be, the law upon the subject-matter of taking and using depositions. He follows the English statutes so far as they lead, and bases his suggestions upon decided cases, and upon his experience and practice. Upon the general subject, see 1 Greenl. Ev. §§ 220, 320–325, 517, 552–555. Each State, however, has its special provisions, a collection whereof would hardly be appropriate to this compendium of general principles.}

[2] R. *v.* Stephenson, L. & C. 165.

[3] R. *v.* Scaife, 17 Q. B. 773.

[4] Analogy of R. *v.* Scaife.

[or, that the statement was not taken upon oath;
or [perhaps] that it was not read over to or signed by the witness.][1]

If there is a prospect of the recovery of a witness proved to be too ill to travel, the judge is not obliged to receive the deposition, but may postpone the trial.[2]

ARTICLE 141.

DEPOSITIONS UNDER 30 & 31 VICT. C. 35, S. 6.

A deposition taken for the perpetuation of testimony in criminal cases, under 30 & 31 Vict. c. 35, s. 6, may be produced and read as evidence, either for or against the accused, upon the trial of any offender or offence[3] to which it relates—

if the deponent is proved to be dead, or

if it is proved that there is no reasonable probability that the deponent will ever be able to travel or to give evidence, and

if the deposition purports to be signed by the justice by or before whom it purports to be taken, and

if it is proved to the satisfaction of the Court that reasonable notice of the intention to take such deposition was served upon the person (whether prosecutor or accused) against whom it is proposed to be read, and

that such person or his counsel or attorney had or might have had, if he had chosen to be present, full opportunity of cross-examining the deponent.[4]

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[1] I believe the above to be the effect of 11 & 12 Vict. c. 42, s. 17, as interpreted by the cases referred to, the effect of which is given by the words in brackets, also by common practice. Nothing can be more rambling or ill-arranged than the language of the section itself. See 1 Ph. Ev. 87–100; T. E. s. 448, &c.

[2] R. *v.* Tait, 2 F. & F. 553.

[3] *Sic.*

[4] 30 & 31 Vict. c. 35, s. 6. The section is very long, and as the first part of it belongs rather to the subject of criminal procedure

ARTICLE 142.

DEPOSITIONS UNDER MERCHANT SHIPPING ACT, 1854.

[1] Whenever, in the course of any legal proceedings instituted in any part of Her Majesty's dominions before any judge or magistrate or before any person authorized by law or by consent of parties to receive evidence, the testimony of any witness is required in relation to the subject-matter of such proceeding, any deposition that such witness may have previously made on oath in relation to the same subject-matter before any justice or magistrate in Her Majesty's dominions or any British consular officer elsewhere is admissible in evidence, subject to the following restrictions:—

1. If such proceeding is instituted in the United Kingdom or British possessions, due proof must be given that such witness cannot be found in that kingdom or possession respectively.

2. If such deposition was made in the United Kingdom, it is not admissible in any proceeding instituted in the United Kingdom.

3. If the deposition was made in any British possession, it is not admissible in any proceeding instituted in the same British possession.

4. If the proceeding is criminal, the deposition is not

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than to the subject of evidence, I have omitted it. The language is slightly altered. I have not referred to depositions taken before a coroner (see 7 Geo. IV. c. 64, s. 4), because the section says nothing about the conditions on which they may be given in evidence. Their relevancy, therefore, depends on the common-law principles expressed in article 33. They must be signed by the coroner; but these are matters not of evidence, but of criminal procedure.

[1] 17 & 18 Vict. c. 104, s. 270. There are some other cases in which depositions are admissible by statute, but they hardly belong to the Law of Evidence.

admissible unless it was made in the presence of the person accused.

Every such deposition must be authenticated by the signature of the judge, magistrate, or consular officer before whom it was made. Such judge, magistrate, or consular officer must, when the deposition is taken in a criminal matter, certify (if the fact is so) that the accused was present at the taking thereof; but it is not necessary in any case to prove the signature or the official character of the person appearing to have signed any such deposition.

In any criminal proceeding the certificate aforesaid is (unless the contrary is proved) sufficient evidence of the accused having been present in manner thereby certified.

Nothing in this article contained affects any provision by Parliament or by any local legislature as to the admissibility of depositions or the practice of any court according to which depositions not so authenticated are admissible as evidence.

CHAPTER XVIII.

OF IMPROPER ADMISSION AND REJECTION OF EVIDENCE.

ARTICLE 143.

A NEW trial will not be granted in any civil action on the ground of the improper admission or rejection of evidence, unless in the opinion of the Court to which the application is made some substantial wrong or miscarriage has been thereby occasioned in the trial of the action.[1]

If in a criminal case evidence is improperly rejected or admitted, there is no remedy, unless the prisoner is con-

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[1] Judicature Act, 1875, Order xxxix. 3. {This act is substantially in affirmance of the common law, which holds that, if it clearly appears that the error could not affect the verdict, no new trial will be granted. Wright *v.* Tatham, 7 A. & E. 330; Wing *v.* Chesterfield, 116 Mass. 353; Railroad Co. *v.* Smith, 21 Wall. (U. S.) 255. In Thorndike *v.* Boston, 1 Met. (Mass.) 242, it is said that no new trial will be granted, if the Court would feel bound to set aside a different verdict, based upon the erroneously admitted or excluded evidence. The improper admission of evidence will be a ground for a new trial, although the jury accompany their verdict by a statement that they have arrived at their conclusion independently of the evidence improperly admitted. Bailey *v.* Haines, 19 L. J. Q. B. 73. In Missouri, even in a criminal case, it has been held that, though evidence be improperly excluded, yet a new trial will not be granted, if, upon all the evidence, it appears to the court that the defendant is so clearly guilty that the admission of the evidence would not have aided the defendant. State *v.* Hays, 23 Mo. 287. And so it seems to have been held in South Carolina, where improper evidence was admitted, State *v.* Ford, 3 Strobh. 517, n.; and in Texas, Boon *v.* State, 42 Texas, 237; and in Connecticut, State *v.* Alford, 31 Conn. 40. *Contra*, in California. People *v.* Williams, 18 Cal. 187.}

victed, and unless the judge, in his discretion, states a case for the Court for Crown Cases Reserved; but if that Court is of opinion that any evidence was improperly admitted or rejected, it must set aside the conviction.[1]

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[1] {The practice in this country is different. We believe that in all the States the defendant may except to the improper admission or exclusion of adverse evidence, and in some of the States the government may also except.}

APPENDIX OF NOTES.

NOTE I.

(To ARTICLE 1.)

THE definitions are simply explanations of the senses in which the words defined are used in this work. They will be found, however, if read in connection with my "Introduction to the Indian Evidence Act," to explain the manner in which it is arranged.

I use the word "presumption" in the sense of a presumption of law capable of being rebutted. A presumption of fact is simply an argument. A conclusive presumption I describe as conclusive proof. Hence the few presumptions of law which I have thought it necessary to notice are the only ones I have to deal with.

As to the definition of the word "relevant," I have considerably modified what I formerly said on the subject, for reasons given in the preface to this edition. The definition of "relevancy" is substituted for the following, which in the earlier editions of the work formed the last article of the first chapter, and to which the remainder of the present note was appended as a note.

Facts, whether in issue or not, are relevant to each other when one is, or probably may be, or probably may have been —

the cause of the other;
the effect of the other;
an effect of the same cause;
a cause of the same effect:

or when the one shows that the other must or cannot have occurred, or probably does or did exist, or not;

or that any fact does or did exist, or not, which in the common course of events would either have caused or have been caused by the other;

provided that such facts do not fall within the exclusive rules contained in Chapters III., IV., V., VI.; or that they do fall within the exceptions to those rules contained in those chapters.

This is taken (with some verbal alterations) from a pamphlet called "The Theory of Relevancy for the purpose of Judicial Evidence, by George Clifford Whitworth, Bombay Civil Service. Bombay, 1875."

The 7th section of the Indian Evidence Act is as follows: "Facts which are the occasion, cause, or effect, immediate or otherwise, of relevant facts or facts in issue, or which constitute the state of things under which they happened, or which afforded an opportunity for their occurrence or transaction, are relevant."

The 11th section is as follows:

"Facts not otherwise relevant are relevant;

"(1) If they are inconsistent with any fact in issue or relevant fact;

"(2) If by themselves, or in connection with other facts, they make the existence or non-existence of any fact in issue, or relevant fact, highly probable or improbable."

In my "Introduction to the Indian Evidence Act," I examined at length the theory of judicial evidence, and tried to show that the theory of relevancy is only a particular case of the process of induction, and that it depends on the connection of events as cause and effect. This theory does not greatly differ from Bentham's, though he does not seem to me to have grasped it as distinctly as he probably would if he had lived to study Mr. Mill's Inductive Logic.

My theory was expressed too widely in certain parts,

and not widely enough in others; and Mr. Whitworth's pamphlet appears to me to have corrected and completed it in a judicious manner. I accordingly embodied his definition of relevancy, with some variations and additions, in the text of the first edition. I now reprint it here for reasons given in the preface. The necessity of limiting in some such way the terms of the 11th section of the Indian Evidence Act may be inferred from a judgment by Mr. Justice West (of the High Court of Bombay), in the case of R. *v.* Parbhudas and Others, printed in the "Law Journal," May 27, 1876.

As to the coincidence of this theory with English law, I can only say that it will be found to supply a key which will explain all that is said on the subject of circumstantial evidence by the writers who have treated of that subject. Mr. Whitworth goes through the evidence given against the German, Müller, executed for murdering Mr. Briggs on the North London Railway, and shows how each item of it can be referred to one or the other of the heads of relevancy which he discusses.

The theory of relevancy thus expressed would, I believe, suffice to solve every question which can arise upon the subject; but the legal rules based upon an unconscious apprehension of the theory exceed it at some points and fall short of it at others, as I have pointed out in the preface to this edition.

NOTE II.

(TO ARTICLE 2.)

See 1 Ph. Ev. 493, &c.; Best, ss. 111 and 251; T. E. chap. ii. pt. ii.; {1 Greenl. Ev. § 49 *et seq.*}

For instances of relevant evidence held to be insufficient for the purpose for which it was tendered on the ground of remoteness, see R. *v.* ——, 2 C. & P. 459; and Mann *v.* Langton, 3 A. & E. 699.

Mr. Taylor (s. 867) adopts from Professor Greenleaf the statement that "the law excludes on public grounds . . . evidence which is indecent or offensive to public morals, or injurious to the feelings of third persons." The authorities given for this are actions on wagers which the Court refused to try, or in which they arrested judgment, because the wagers were in themselves impertinent and offensive, as, for instance, a wager as to the sex of the Chevalier D'Eon (Da Costa *v.* Jones, Cowp. 729). No action now lies upon a wager, and I fear that there is no authority for the proposition advanced by Professor Greenleaf. I know of no case in which a fact in issue or relevant to an issue which the Court is bound to try can be excluded merely because it would pain some one who is a stranger to the action. Indeed, in Da Costa *v.* Jones, Lord Mansfield said expressly, "Indecency of evidence is no objection to its being received where it is necessary to the decision of a civil or criminal right" (p. 734). (See article 129, and Note XLVII.)

{Greenleaf says that such evidence is excluded when it is "impertinently" brought into Court by parties "having no interest in the matter," an important limitation, inadvertently, no doubt, omitted by the author. See 1 Greenl. Ev. § 253.}

NOTE III.

(To Article 4.)

On this subject see also 1 Ph. Ev. 157–164; T. E. ss. 527–532; Best, s. 508; 3 Russ. on Crimes, by Greaves, 161–167. (See, too, The Queen's Case, 2 Br. & Bing. 309–310.) {1 Greenl. Ev. § 111.}

The principle is substantially the same as that of principal and accessory, or principal and agent. When various persons conspire to commit an offence each makes the rest his agents to carry the plan into execution. (See, too, article 17, Note XII.)

NOTE IV.

(TO ARTICLE 5.)

The principle is fully explained and illustrated in Malcolmson *v.* O'Dea, 10 H. L. C. 593. See particularly the reply to the questions put by the House of Lords to the Judges, delivered by Willes, J., 611–622.

See also 1 Ph. Ev. 234–239; T. E. ss. 593–601; Best, s. 499; {1 Greenl. Ev. §§ 141–146.}

Mr. Phillips and Mr. Taylor treat this principle as an exception to the rule excluding hearsay. They regard the statements contained in the title-deeds as written statements made by persons not called as witnesses. I think the deeds must be regarded as constituting the transactions which they effect; and in the case supposed in the text, those transactions are actually in issue. When it is asserted that land belongs to A, what is meant is, that A is entitled to it by a series of transactions of which his title-deeds are by law the exclusive evidence (see article 40). The existence of the deeds is thus the very fact which is to be proved.

Mr. Best treats the case as one of "derivative evidence," an expression which does not appear to me felicitous.

NOTE V.

(TO ARTICLE 8.)

The items of evidence included in this article are often referred to by the phrase "res gestæ," which seems to have come into use on account of its convenient obscurity. The doctrine of "res gestæ" was much discussed in the case of Doe *v.* Tatham (p. 79, &c.). In the course of the argument, Bosanquet, J., observed, "How do you translate res gestæ? gestæ, by whom?" Parke, B., afterwards observed, "The acts by whomsoever done are res gestæ,

if relevant to the matter in issue. But the question is, what are relevant?" (7 A. & E. 353.) In delivering his opinion to the House of Lords, the same Judge laid down the rule thus: "Where any facts are proper evidence upon an issue [i. e. when they are in issue, or relevant to the issue] all oral or written declarations which can explain such facts may be received in evidence." (Same case, 4 Bing. N. C. 548.) The question asked by Baron Parke goes to the root of the whole subject, and I have tried to answer it at length in the text, and to give it the prominence in the statement of the law which its importance deserves.[1]

Besides the cases cited in the illustrations, see cases as to statements accompanying acts collected in 1 Ph. Ev. 152–157, and T. E. ss. 521, 528; {1 Greenl. Ev. § 108.} I have stated, in accordance with R. *v.* Walker, 2 M. & R. 212, that the particulars of a complaint are not admissible; but I have heard Willes, J., rule that they were on several occasions, vouching Parke, B., as his authority. R. *v.* Walker was decided by Parke, B., in 1839. Though he excluded the statement, he said, "The sense of the thing certainly is, that the jury should in the first instance know the nature of the complaint made by the prosecutrix, and all that she then said. But for reasons which I never could understand, the usage has obtained that the prosecutrix's counsel should only inquire generally whether a complaint was made by the prosecutrix of the prisoner's conduct towards her, leaving the prisoner's counsel to bring before the jury the particulars of that complaint by cross-examination."

Baron Bramwell has been in the habit, of late years, of admitting the complaint itself. The practice is certainly in accordance with common sense.

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[1] {Res gestæ are the circumstances, facts, and declarations which grow out of the main fact, are extemporaneous with it, and serve to illustrate its character. Carter *v.* Buchannan, 8 Ga. 513.}

NOTE VI.

(TO ARTICLES 10, 11, 12.)

Article 10 is equivalent to the maxim, "Res inter alios acta alteri nocere non debet," which is explained and commented on in Best, ss. 506–510 (though I should scarcely adopt his explanation of it), and by Broom ("Maxims," 954–968). The application of the maxim to the Law of Evidence is obscure, because it does not show how unconnected transactions should be supposed to be relevant to each other. The meaning of the rule must be inferred from the exceptions to it stated in articles 11 and 12, which show that it means, You are not to draw inferences from one transaction to another which is not specifically connected with it merely because the two resemble each other. They must be linked together by the chain of cause and effect in some assignable way before you can draw your inference.

In its literal sense the maxim also fails, because it is not true that a man cannot be affected by transactions to which he is not a party. Illustrations to the contrary are obvious and innumerable; bankruptcy, marriage, indeed every transaction of life, would supply them.

The exceptions to the rule given in articles 11 and 12 are generalized from the cases referred to in the illustrations. It is important to observe that though the rule is expressed shortly, and is sparingly illustrated, it is of very much greater importance and more frequent application than the exceptions. It is indeed one of the most characteristic and distinctive parts of the English Law of Evidence, for this is the rule which prevents a man charged with a particular offence from having either to submit to imputations which in many cases would be fatal to him, or else to defend every action of his whole life in order to explain his conduct on the particular

occasion. A statement of the Law of Evidence which did not give due prominence to the four great exclusive rules of evidence of which this is one would neither represent the existing law fairly nor in my judgment improve it.

The exceptions to the rule apply more frequently to criminal than to civil proceedings, and in criminal cases the Courts are always disinclined to run the risk of prejudicing the prisoner by permitting matters to be proved which tend to show in general that he is a bad man, and so likely to commit a crime. In each of the cases by which article 12 is illustrated, the evidence admitted went to prove the true character of facts which, standing alone, might naturally have been accounted for on the supposition of accident — a supposition which was rebutted by the repetition of similar occurrences. In the case of R. *v.* Gray (Illustration *a*), there were many other circumstances which would have been sufficient to prove the prisoner's guilt, apart from the previous fires. That part of the evidence, indeed, seemed to have little influence on the jury. Garner's Case (Illustration *c*, note) was an extraordinary one, and its result was in every way unsatisfactory. Some account of this case will be found in the evidence given by me before the Commission on Capital Punishments which sat in 1866.

NOTE VII.

(To Article 13.)

As to presumptions arising from the course of office or business, see Best, s. 403; 1 Ph. Ev. 480–484; T. E. s. 147; {1 Greenl. Ev. § 40.} The presumption, "Omnia esse rite acta," also applies. See Broom's "Maxims," 942; Best, ss. 353–365; T. E. s. 124, &c.; 1 Ph. Ev. 480; and Star. 757, 763; {1 Greenl. Ev. § 38 *a*, note.}

NOTE VIII.

(To ARTICLE 14.)

My reasons for partially rearranging this chapter are given in the preface to this edition.

The unsatisfactory character of the definitions usually given of hearsay is well known. See Best, s. 495; T. E. ss. 507–510; {1 Greenl. Ev. § 98 *et seq.*} The definition given by Mr. Phillips sufficiently exemplifies it: "When a witness, in the course of stating what has come under the cognizance of his own senses concerning a matter in dispute, *states the language of others which he has heard*, or produces papers which he identifies as being written by particular individuals, he offers what is called hearsay evidence. This matter may sometimes be the very matter in dispute," &c. (1 Ph. Ev. 143). If this definition is correct, the maxim, "Hearsay is no evidence," can only be saved from the charge of falsehood by exceptions which make nonsense of it. By attaching to it the meaning given in the text, it becomes both intelligible and true. There is no real difference between the fact that a man was heard to say this or that, and any other fact. Words spoken may convey a threat, supply the motive for a crime, constitute a contract, amount to slander, &c., &c.; and if relevant or in issue, on these or other grounds, they must be proved, like other facts, by the oath of some one who heard them. The important point to remember about them is that bare assertion must not, generally speaking, be regarded as relevant to the truth of the matter asserted.

The doctrine of hearsay evidence was fully discussed by many of the judges in the case of Doe *d.* Wright *v.* Tatham on the different occasions when that case came before the Court (see 7 A. & E. 313–408; 4 Bing. N. C. 489–573). The question was, whether letters addressed

to a deceased testator, implying that the writers thought him sane, but not acted upon by him, could be regarded as relevant to his sanity, which was the point in issue. The case sets the stringency of the rule against hearsay in a light which is forcibly illustrated by a passage in the judgment of Baron Parke (7 A. & E. 385–388), to the following effect: — He treats the letters as "statements of the writers, not on oath, of the truth of the matter in question, with this addition, that they have acted upon the statements on the faith of their being true by their sending the letters to the testator." He then goes through a variety of illustrations which had been suggested in argument, and shows that in no case ought such statements to be regarded as relevant to the truth of the matter stated, even when the circumstances were such as to give the strongest possible guarantee that such statements expressed the honest opinions of the persons who made them. Amongst others he mentions the following: — "The conduct of the family or relations of a testator taking the same precautions in his absence as if he were a lunatic — his election in his absence to some high and responsible office; the conduct of a physician who permitted a will to be executed by a sick testator; the conduct of a deceased captain on a question of seaworthiness, who, after examining every part of a vessel, embarked in it with his family; all these, when deliberately considered, are, with reference to the matter in issue in each case, mere instances of hearsay evidence — mere statements, not on oath, but implied in or vouched by the actual conduct of persons by whose acts the litigant parties are not to be bound." All these matters are therefore to be treated as irrelevant to the questions at issue.

These observations make the rule quite distinct, but the reason suggested for it in the concluding words of the passage extracted appears to be weak. That passage

implies that hearsay is excluded because no one "ought to be bound by the act of a stranger." That no one shall have power to make a contract for another or commit a crime for which that other is to be responsible without his authority is obviously reasonable, but it is not so plain why A's conduct should not furnish good grounds for inference as to B's conduct, though it was not authorized by B. The importance of shortening proceedings, the importance of compelling people to procure the best evidence they can, and the importance of excluding opportunities of fraud, are considerations which probably justify the rule excluding hearsay; but Baron Parke's illustrations of its operation clearly prove that in some cases it excludes the proof of matter which, but for it, would be regarded not only as relevant to particular facts, but as good grounds for believing in their existence.

NOTE IX.

(To ARTICLE 15.)

This definition is intended to exclude admissions by pleading, admissions which, if so pleaded, amount to estoppels, and admissions made for the purposes of a cause by the parties or their solicitors. These subjects are usually treated of by writers on evidence; but they appear to me to belong to other departments of the law. The subject, including the matter which I omit, is treated at length in 1 Ph. Ev. 308–401, and T. E. ss. 653–788. {1 Greenl. Ev. § 169 *et seq.*} A vast variety of cases upon admissions of every sort may be found by referring to Roscoe, N. P. (Index, under the word *Admissions.*) It may perhaps be well to observe that when an admission is contained in a document, or series of documents, or when it forms part of a discourse or conversation, so much and no more of the document, series of docu-

ments, discourse or conversation, must be proved as is necessary for the full understanding of the admission, but the judge or jury may of course attach degrees of credit to different parts of the matter proved. This rule is elaborately discussed and illustrated by Mr. Taylor, ss. 655–665. It has lost much of the importance which attached to it when parties to actions could not be witnesses, but could be compelled to make admissions by bills of discovery. The ingenuity of equity draughtsmen was under that system greatly exercised in drawing answers in such a form that it was impossible to read part of them without reading the whole, and the ingenuity of the Court was at least as much exercised in countermining their ingenious devices. The power of administering interrogatories, and of examining the parties directly, has made great changes in these matters.

NOTE X.

(To ARTICLE 16.)

As to admissions by parties, see Moriarty *v.* L. C. & D. Railway, L. R. 5 Q. B. 320, per Blackburn, J.; Alner *v.* George, 1 Camp. 392; Bauerman *v.* Radenius, 7 T. R. 663.

As to admissions by parties interested, see Spargo *v.* Brown, 9 B. & C. 938.

See also on the subject of this article 1 Ph. Ev. 362–363, 369, 398; and T. E. ss. 669–671, 685, 687, 719; Roscoe, N. P. 71.

As to admissions by privies, see 1 Ph. Ev. 394–397, and T. E. (from Greenleaf), s. 712; {1 Greenl. Ev. § 189.}

NOTE XI.

(To ARTICLE 17.)

The subject of the relevancy of admissions by agents is rendered difficult by the vast variety of forms which

agency assumes, and by the distinction between an agent for the purpose of making a statement and an agent for the purpose of transacting business. If A sends a message by B, B's words in delivering it are in effect A's; but B's statements in relation to the subject-matter of the message have, as such, no special value. A's own statements are valuable if they suggest an inference which he afterwards contests because they are against his interest; but when the agent's duty is done, he has no special interest in the matter.

The principle as to admissions by agents is stated and explained by Sir W. Grant in Fairlie *v.* Hastings, 10 Ve. 126–127.

NOTE XII.

(To ARTICLE 18.)

See, for a third exception (which could hardly occur now), Clay *v.* Langslow, M. & M. 45.

NOTE XIII.

(To ARTICLE 19.)

This comes very near to the case of arbitration. See, as to irregular arbitrations of this kind, 1 Ph. Ev. 383; T. E. ss. 689–690; {1 Greenl. Ev. § 182.}

NOTE XIV.

(To ARTICLE 20.)

See more on this subject in 1 Ph. Ev. 326–328; T. E. ss. 702, 720–723; R. N. P. 66; {1 Greenl. Ev. § 192 *et seq.*}

NOTE XV.

(To ARTICLE 22.)

On the law as to Confessions, see {1 Greenl. Ev. § 213 *et seq.*;} 1 Ph. Ev. 401–423; T. E. ss. 796–807, and s. 824;

Best, ss. 551–574; Roscoe, Cr. Ev. 38–56; 3 Russ. on Crimes, by Greaves, 365–436. Joy on Confessions reduces the law on the subject to the shape of 13 propositions, the effect of all of which is given in the text in a different form.

Many cases have been decided as to the language which amounts to an inducement to confess (see Roscoe, Cr. Ev. 40–43, where most of them are collected). They are, however, for practical purposes, summed up in R. *v.* Baldry, 2 Den. 430, which is the authority for the last lines of the first paragraph of this article.

NOTE XVI.

(To Article 23.)

Cases are sometimes cited to show that if a person is examined as a witness on oath, his deposition cannot be used in evidence against him afterwards (see T. E. ss. 809 and 818, n. 6; also 3 Russ. on Cri. by Greaves, 407, &c.). All these cases, however, relate to the examinations before magistrates of persons accused of crimes, under the statutes which were in force before 11 & 12 Vict. c. 42.

These statutes authorized the examination of prisoners, but not their examination upon oath. The 11 & 12 Vict. c. 42, prescribes the form of the only question which the magistrate can put to a prisoner; and since that enactment it is scarcely possible to suppose that any magistrate would put a prisoner upon his oath. The cases may therefore be regarded as obsolete.

NOTE XVII.

(To Article 26.)

As to dying declarations, see {1 Greenl. Ev. § 156 *et seq.*;} 1 Ph. Ev. 239–252; T. E. ss. 644–652; Best, s. 505; Starkie, 32 & 38; 3 Russ. Cri. 250–272 (perhaps

the fullest collection of the cases on the subject); Roscoe, Crim. Ev. 31–32. R. *v.* Baker, 2 Mo. & Ro. 53, is a curious case on this subject. A and B were both poisoned by eating the same cake. C was tried for poisoning A. B's dying declaration that she made the cake in C's presence, and put nothing bad in it, was admitted as against C, on the ground that the whole formed one transaction.

NOTE XVIII.

(TO ARTICLE 27.)

1 Ph. Ev. 280–300; T. E. ss. 630–643; Best, 501; R. N. P. 63; and see note to Price *v.* Lord Torrington, 2 S. L. C. 328; {1 Greenl. Ev. §§ 116, 120, and notes.}

NOTE XIX.

(TO ARTICLE 28.)

The best statement of the law upon this subject will be found in Higham *v.* Ridgway, and the note thereto, 2 S. L. C. 318. See also {1 Greenl. Ev. §§ 147–155;} 1 Ph. Ev. 252–280; T. E. ss. 602–629; Best, s. 500; R. N. P. 584.

A class of cases exists which I have not put into the form of an article, partly because their occurrence since the commutation of tithes must be very rare, and partly because I find a great difficulty in understanding the place which the rule established by them ought to occupy in a systematic statement of the law. They are cases which lay down the rule that statements as to the receipts of tithes and moduses made by deceased rectors and other ecclesiastical corporations sole are admissible in favor of their successors. There is no doubt as to the rule (see, in particular, Short *v.* Lee, 2 Jac. & Wal. 464; and Young *v.* Clare Hall, 17 Q. B. 537). The difficulty is to see why it was ever regarded as an exception. It falls directly within the principle stated in the text, and would

appear to be an obvious illustration of it; but in many cases it has been declared to be anomalous, inasmuch as it enables a predecessor in title to make evidence in favor of his successor. This suggests that article 28 ought to be limited by a proviso that a declaration against interest is not relevant if it was made by a predecessor in title of the person who seeks to prove it, unless it is a declaration by an ecclesiastical corporation sole, or a member of an ecclesiastical corporation aggregate (see Short *v.* Lee), as to the receipt of a tithe or modus.

Some countenance for such a proviso may be found in the terms in which Bayley, J., states the rule in Gleadow *v.* Atkin, and in the circumstance that when it first obtained currency the parties to an action were not competent witnesses. But the rule as to the indorsement of notes, bonds, &c., is distinctly opposed to such a view.

NOTE XX.

(To Article 30.)

Upon this subject, besides the authorities in the text, see {1 Greenl. Ev. § 127 *et seq.*;} 1 Ph. Ev. 169–197; T. E. ss. 543–569; Best, s. 497; R. N. P. 50–54 (the latest collection of cases).

A great number of cases have been decided as to the particular documents, &c., which fall within the rule given in the text. They are collected in the works referred to above, but they appear to me merely to illustrate one or other of the branches of the rule, and not to extend or vary it. An award, *e.g.*, is not within the last branch of illustration (*b*), because it "is but the opinion of the arbitrator, not upon his own knowledge" (Evans *v.* Rees, 10 A. & E. 155); but the detailed application of such a rule as this is better learnt by experience, applied to a firm grasp of principle, than by an attempt to recollect innumerable cases.

The case of Weeks *v.* Sparke is remarkable for the light it throws on the history of the Law of Evidence. It was decided in 1813, and contains *inter alia* the following curious remarks by Lord Ellenborough: "It is stated to be the habit and practice of different circuits to admit this species of evidence upon such a question as the present. That certainly cannot make the law, but it shows at least, from the established practice of a large branch of the profession, and of the judges who have presided at various times on those circuits, what has been the prevailing opinion upon this subject amongst so large a class of persons interested in the due administration of the law. It is stated to have been the practice both of the Northern and Western Circuits. My learned predecessor, Lord Kenyon, certainly held a different opinion, the practice of the Oxford Circuit, of which he was a member, being different." So in the Berkeley Peerage Case, Lord Eldon said, "when it was proposed to read this deposition as a declaration, the Attorney-General (Sir Vicary Gibbs) flatly objected to it. *He spoke quite right as a Western Circuiteer*, of what he had often heard laid down in the West, and never heard doubted" (4 Cam. 419, A.D. 1811). This shows how very modern much of the Law of Evidence is. Le Blanc, J., in Weeks *v.* Sparkes, says, that a foundation must be laid for evidence of this sort "by acts of enjoyment within living memory." This seems superfluous, as no jury would ever find that a public right of way existed, which had not been used in living memory, on the strength of a report that some deceased person had said that there once was such a right.

NOTE XXI.

(TO ARTICLE 31.)

See {1 Greenl. Ev. § 134;} 1 Ph. Ev. 197–233; T. E. ss. 571–592; Best, 633; R. N. P. 49–50.

The Berkeley Peerage Case (Answers of the Judges to the House of Lords), 4 Cam. 401, which established the third condition given in the text; and Davies *v.* Lowndes, 6 M. & G. 471 (see more particularly pp. 525–529, in which the question of family pedigrees is fully discussed) are specially important on this subject.

As to declarations as to the place of births, &c., see Shields *v.* Boucher, 1 De G. & S. 49–58.

NOTE XXII.

(To ARTICLE 32.)

See also {1 Greenl. Ev. § 163 *et seq.*;} 1 Ph. Ev. 306–308; T. E. ss. 434–447; Buller, N. P. 238, and following.

In reference to this subject it has been asked whether this principle applies indiscriminately to all kinds of evidence in all cases. Suppose a man were to be tried twice upon the same facts — *e. g.* for robbery after an acquittal for murder, and suppose that in the interval between the two trials an important witness who had not been called before the magistrates were to die, might his evidence be read on the second trial from a reporter's short-hand notes? This case might easily have occurred if Orton had been put on his trial for forgery as well as for perjury. I should be disposed to think on principle that such evidence would be admissible, though I cannot cite any authority on the subject. The common-law principle on which depositions taken before magistrates and in Chancery proceedings were admitted seems to cover the case.

NOTE XXIII.

(To ARTICLES 39–47.)

The law relating to the relevancy of judgments of Courts of Justice to the existence of the matters which they assert is made to appear extremely complicated by

the manner in which it is usually dealt with. The method commonly employed is to mix up the question of the effect of judgments of various kinds with that of their admissibility, subjects which appear to belong to different branches of the law.

Thus the subject, as commonly treated, introduces into the Law of Evidence an attempt to distinguish between judgments *in rem*, and judgments *in personam* or *inter partes* (terms adapted from, but not belonging to, Roman law, and never clearly defined in reference to our own or any other system); also the question of the effect of the pleas of *autrefois acquit*, and *autrefois convict*, which clearly belong not to evidence, but to criminal procedure; the question of estoppels, which belongs rather to the law of pleading than to that of evidence; and the question of the effect given to the judgments of foreign Courts of Justice, which would seem more properly to belong to private international law. These and other matters are treated of at great length in {1 Greenl. Ev. § 523 *et seq.*;} 2 Ph. Ev. 1–78, and T. E. ss. 1480–1534, and in the note to the Duchess of Kingston's Case, in 2 S. L. C. 777–880. Best (ss. 588–595) treats the matter more concisely.

The text is confined to as complete a statement as I could make of the principles which regulate the relevancy of judgments considered as declarations proving the facts which they assert, whatever may be the effect or the use to be made of those facts when proved. Thus the leading principle stated in article 40 is equally true of all judgments alike. Every judgment, whether it be *in rem* or *inter partes*, must and does prove what it actually effects, though the effects of different sorts of judgments differ as widely as the effects of different sorts of deeds.

There has been much controversy as to the extent to which effect ought to be given to the judgments of foreign Courts in this country, and as to the cases in which the Courts will refuse to act upon them; but as a mere ques-

tion of evidence, they do not differ from English judgments. The cases on foreign judgments are collected in the note to the Duchess of Kingston's Case, 2 S. L. C. 813–845. There is a convenient list of the cases in R. N. P. 201–203. The cases of Godard *v.* Gray, L. R. 6 Q. B. 139, and Castrique *v.* Imrie, L. E. 4 R. & I. A. 414, are the latest leading cases on the subject.

NOTE XXIV.

(To CHAPTER V.)

On evidence of opinions, see {1 Greenl. Ev. § 446 *et seq.*;} 1 Ph. Ev. 520–528; T. E. ss. 1273–1281; Best, ss. 511–517; R. N. P. 193–194. The leading case on the subject is Doe *v.* Tatham, 7 A. & E. 313; and 4 Bing. N. C. 489, referred to above in Note IX. Baron Parke, in the extracts there given, treats an expression of opinion as hearsay, that is, as a statement affirming the truth of the subject-matter of the opinion.

NOTE XXV.

(To CHAPTER VI.)

See {1 Greenl. Ev. § 461 *et seq.*;} 1 Ph. Ev. 502–508; T. E. ss. 325–336; Best, ss. 257–263; 3 Russ. Cr. 299–304. The subject is considered at length in R. *v.* Rowton, 1 L. & C. 520. One consequence of the view of the subject taken in that case is that a witness may with perfect truth swear that a man, who to his knowledge has been a receiver of stolen goods for years, has an excellent character for honesty, if he has had the good luck to conceal his crimes from his neighbors. It is the essence of successful hypocrisy to combine a good reputation with a bad disposition, and according to R. *v.* Rowton, the reputation is the important matter. The case is

seldom if ever acted on in practice. The question always put to a witness to character is, What is the prisoner's character for honesty, morality, or humanity? as the case may be; nor is the witness ever warned that he is to confine his evidence to the prisoner's reputation. It would be no easy matter to make the common run of witnesses understand the distinction.

NOTE XXVI.

(To ARTICLE 58.)

The list of matters judicially noticed in this article is not intended to be quite complete. It is compiled from 1 Ph. Ev. 458–467, and T. E. ss. 4–20, where the subject is gone into more minutely. {1 Greenl. Ev. §§ 4–6, and notes.} A convenient list is also given in R. N. P. ss. 88–92, which is much to the same effect. It may be doubted whether an absolutely complete list could be formed, as it is practically impossible to enumerate every thing which is so notorious in itself, or so distinctly recorded by public authority, that it would be superfluous to prove it. Paragraph (1) is drawn with reference to the fusion of Law, Equity, Admiralty, and Testamentary Jurisdiction effected by the Judicature Act.

NOTE XXVII.

(To ARTICLE 62.)

Owing to the ambiguity of the word "evidence," which is sometimes used to signify the effect of a fact when proved, and sometimes to signify the testimony by which a fact is proved, the expression "hearsay is no evidence" has many meanings. Its common and most important meaning is the one given in article 14, which might be otherwise expressed by saying that the connection between events, and reports that they have happened,

is generally so remote that it is expedient to regard the existence of the reports as irrelevant to the occurrence of the events, except in excepted cases. Article 62 expresses the same thing from a different point of view, and is subject to no exceptions whatever. It asserts that whatever may be the relation of a fact to be proved to the fact in issue, it must, if proved by oral evidence, be proved by direct evidence. For instance, if it were to be proved under article 31 that A, who died fifty years ago, said that he had heard from his father B, who died 100 years ago, that A's grandfather C had told B that D, C's elder brother, died without issue, A's statement must be proved by some one who, with his own ears, heard him make it. If (as in the case of verbal slander) the speaking of the words was the very point in issue, they must be proved in precisely the same way. Cases in which evidence is given of character and general opinion may perhaps seem to be exceptions to this rule, but they are not so. When a man swears that another has a good character, he means that he has heard many people, though he does not particularly recollect what people, speak well of him, though he does not recollect all that they said.

NOTE XXVIII.

(To ARTICLES 66 & 67.)

This is probably the most ancient, and is, as far as it extends, the most inflexible of all the rules of evidence. The following characteristic observations by Lord Ellenborough occur in R. *v.* Harringworth, 4 M. & S. 353:

"The rule, therefore, is universal that you must first call the subscribing witness; and it is not to be varied in each particular case by trying whether, in its application, it may not be productive of some inconvenience, for then there would be no such thing as a general rule. *A lawyer who is well stored with these rules would be no*

better than any other man that is without them, if by mere force of speculative reasoning it might be shown that the application of such and such a rule would be productive of such and such an inconvenience, and therefore ought not to prevail; but if any general rule ought to prevail, this is certainly one that is as fixed, formal, and universal as any that can be stated in a Court of Justice."

In Whyman *v.* Garth, 8 Ex. 807, Pollock, C. B., said, "The parties are supposed to have agreed *inter se* that the deed shall not be given in evidence without his [the attesting witness] being called to depose to the circumstances attending its execution."

In very ancient times, when the jury were witnesses as to matter of fact, the attesting witnesses to deeds (if a deed came in question) would seem to have been summoned with, and to have acted as a sort of assessors to, the jury. See as to this, Bracton, fo. 38 *a*; Fortescue de Laudibus, ch. xxxii. with Selden's note; and cases collected from the Year-books in Brooke's Abridgment, tit. *Testmoignes*.

For the present rule, and the exceptions to it, see 1 Ph. Ev. 242–261; T. E. ss. 1637–1642; R. N. P. 147–150; Best, ss. 220, &c.; {1 Greenl. Ev. § 569 *et seq.*}

The old rule which applied to all attested documents was restricted to those required to be attested by law, by 17 & 18 Vict. c. 125, s. 26, and 28 & 29 Vict. c. 18, ss. 1 & 7.

NOTE XXIX.

(To ARTICLE 72.)

For these rules in greater detail, see {1 Greenl. Ev. § 560 *et seq.*;} 1 Ph. Ev. 452–453, and 2 Ph. Ev. 272–289; T. E. ss. 419–426; R. N. P. 8 & 9.

The principle of all the rules is fully explained in the cases cited in the footnotes, more particularly in Dwyer *v.* Collins, 7 Ex. 639. In that case it is held that the

object of notice to produce is "to enable the party to have the document in Court, and if he does not, to enable his opponent to give parol evidence . . . to exclude the argument that the opponent has not taken all reasonable means to procure the original, which he must do before he can be permitted to make use of secondary evidence" (pp. 647–648).

NOTE XXX.

(To ARTICLE 75.)

Mr. Phillips (ii. 196) says, that upon a plea of nul tiel record, the original record must be produced if it is in the same Court.

Mr. Taylor (s. 1379) says, that upon prosecutions for perjury assigned upon any judicial document the original must be produced. The authorities given seem to me hardly to bear out either of these statements. They show that the production of the original in such cases in the usual course, but not, I think, that it is necessary. The case of Lady Dartmouth *v.* Roberts, 16 Ea. 334, is too wide for the proposition for which it is cited. The matter, however, is of little practical importance.

NOTE XXXI.

(To ARTICLES 77 & 78.)

The learning as to exemplifications and office-copies will be found in the following authorities: {1 Greenl. Ev. § 501 *et seq.*;} Gilbert's Law of Evidence, 11–20; Buller, Nisi Prius, 228, and following; Starkie, 256–266 (fully and very conveniently); 2 Ph. Ev. 196–200; T. E. ss. 1380–1384; R. N. P. 112–115. The second paragraph of article 77 is founded on Appleton *v.* Braybrook, 6 M. & S. 39.

As to exemplifications not under the Great Seal, it is

remarkable that the Judicature Acts give no Seal to the Supreme Court, or the High Court, or any of its divisions.

NOTE XXXII.

(To ARTICLE 90.)

The distinction between this and the following article is, that article 90 defines the cases in which documents are exclusive evidence of the transactions which they embody, while article 91 deals with the interpretation of documents by oral evidence. The two subjects are so closely connected together, that they are not usually treated as distinct; but they are so in fact. A and B make a contract of marine insurance on goods, and reduce it to writing. They verbally agree that the goods are not to be shipped in a particular ship, though the contract makes no such reservation. They leave unnoticed a condition usually understood in the business of insurance, and they make use of a technical expression, the meaning of which is not commonly known. The law does not permit oral evidence to be given of the exception as to the particular ship. It does permit oral evidence to be given to annex the condition; and thus far it decides that for one purpose the document shall, and that for another it shall not, be regarded as exclusive evidence of the terms of the actual agreement between the parties. It also allows the technical term to be explained, and in doing so it interprets the meaning of the document itself. The two operations are obviously different, and their proper performance depends upon different principles. The first depends upon the principle that the object of reducing transactions to a written form is to take security against bad faith or bad memory, for which reason a writing is presumed as a general rule to embody the final and considered determination of the parties to it. The second depends on a consideration of

the imperfections of language, and of the inadequate manner in which people adjust their words to the facts to which they apply.

The rules themselves are not, I think, difficult either to state, to understand, or to remember; but they are by no means easy to apply, inasmuch as from the nature of the case an enormous number of transactions fall close on one side or the other of most of them. Hence the exposition of these rules, and the abridgment of all the illustrations of them which have occurred in practice, occupy a very large space in the different text writers. They will be found in {1 Greenl. Ev. § 275 *et seq.*;} 2 Ph. Ev. 332–424; T. E. ss. 1031–1110; Star. 648–731; Best (very shortly and imperfectly), ss. 226–229; R. N. P. (an immense list of cases) 17–35.

As to paragraph (4), which is founded on the case of Goss *v.* Lord Nugent, it is to be observed that the paragraph is purposely so drawn as not to touch the question of the effect of the Statute of Frauds. It was held in effect in Goss *v.* Lord Nugent that if by reason of the Statute of Frauds the substituted contract could not be enforced, it would not have the effect of waiving part of the original contract; but it seems the better opinion that a verbal rescission of a contract good under the Statute of Frauds would be good. See Noble *v.* Ward, L. R. 2 Ex. 135, and Pollock on Contracts, 411, note (6). A contract by deed can be released only by deed, and this case also would fall within the proviso to paragraph (4).

The cases given in the illustrations will be found to mark sufficiently the various rules stated. As to paragraph (5) a very large collection of cases will be found in the notes to Wigglesworth *v.* Dallison, 1 S. L. C. 598–628, but the consideration of them appears to belong rather to mercantile law than to the Law of Evidence. For instance, the question what stipulations are consistent with, and what are contradictory to, the contract formed

by subscribing a bill of exchange, or the contract between an insurer and an underwriter, are not questions of the Law of Evidence.

NOTE XXXIII.

(TO ARTICLE 91.)

Perhaps the subject-matter of this article does not fall strictly within the Law of Evidence, but it is generally considered to do so; and as it has always been treated as a branch of the subject, I have thought it best to deal with it.

The general authorities for the propositions in the text are the same as those specified in the last note; but the great authority on the subject is the work of Vice-Chancellor Wigram on Extrinsic Evidence. Article 91, indeed, will be found, on examination, to differ from the six propositions of Vice-Chancellor Wigram only in its arrangement and form of expression, and in the fact that it is not restricted to wills. It will, I think, be found, on examination, that every case cited by the Vice-Chancellor might be used as an illustration of one or the other of the propositions contained in it.

It is difficult to justify the line drawn between the rule as to cases in which evidence of expressions of intention is admitted and cases in which it is rejected (paragraph 7, illustrations (*k*), (*l*), and paragraph 8, illustration (*m*)). When placed side by side, such cases as Doe *v.* Hiscocks (illustration *k*) and Doe *v.* Needs (illustration *m*) produce a singular effect. The vagueness of the distinction between them is indicated by the case of Charter *v.* Charter, L. R. 2 P. & D. 315. In this case the testator Forster Charter appointed "my son Forster Charter" his executor. He had two sons, William Forster Charter and Charles Charter, and many circumstances pointed to the conclusion that the person whom the testator wished to be his executor was Charles Charter. Lord Penzance

not only admitted evidence of all the circumstances of the case, but expressed an opinion (p. 319) that, if it were necessary, evidence of declarations of intention might be admitted under the rule laid down by Lord Abinger in Hiscocks *v.* Hiscocks, because part of the language employed ("my son —— Charter") applied correctly to each son, and the remainder, "Forster," to neither. This mode of construing the rule would admit evidence of declarations of intention both in cases falling under paragraph 8, and in cases falling under paragraph 7, which is inconsistent not only with the reasoning in the judgment, but with the actual decision in Doe *v.* Hiscocks. It is also inconsistent with the principles of the judgment in the later case of Allgood *v.* Blake, L. R. 8 Ex. 160, where the rule is stated by Blackburn, J., as follows:— "In construing a will, the Court is entitled to put itself in the position of the testator, and to consider all material facts and circumstances known to the testator with reference to which he is to be taken to have used the words in the will, and then to declare what is the intention evidenced by the words used with reference to those facts and circumstances which were (or ought to have been) in the mind of the testator when he used those words." After quoting Wigram on Extrinsic Evidence, and Doe *v.* Hiscocks, he adds: "No doubt, in many cases the testator has, for the moment, forgotten or overlooked the material facts and circumstances which he well knew. And the consequence sometimes is that he uses words which express an intention which he would not have wished to express, and would have altered if he had been reminded of the facts and circumstances. But the Court is to construe the will as made by the testator, not to make a will for him; and therefore it is bound to execute his expressed intention, even if there is great reason to believe that he has by blunder expressed what he did not mean." The part of Lord Penzance's judgment above

referred to was unanimously overruled in the House of Lords; though the Court, being equally divided as to the construction of the will, refused to reverse the judgment, upon the principle "*præsumitur pronegante.*"

Conclusive as the authorities upon the subject are, it may not, perhaps, be presumptuous to express a doubt whether the conflict between a natural wish to fulfil the intention which the testator would have formed if he had recollected all the circumstances of the case; the wish to avoid the evil of permitting written instruments to be varied by oral evidence; and the wish to give effect to wills, has not produced in practice an illogical compromise. The strictly logical course, I think, would be either to admit declarations of intention both in cases falling under paragraph 7, and in cases falling under paragraph 8, or to exclude such evidence in both classes of cases, and to hold void for uncertainty every bequest or devise which was shown to be uncertain in its application to facts. Such a decision as that in Stringer *v.* Gardiner, the result of which was to give a legacy to a person whom the testator had no wish to benefit, and who was not either named or described in his will, appears to me to be a practical refutation of the principle or rule on which it is based.

Of course every document, whatever, must to some extent be interpreted by circumstances. However accurate and detailed a description of things and persons may be, oral evidence is always wanted to show that persons and things answering the description exist; and therefore in every case whatever, every fact must be allowed to be proved to which the document does, or probably may, refer; but if more evidence than this is admitted, if the Court may look at circumstances which affect the probability that the testator would form this intention or that, why should declarations of intention be excluded? If the question is, "What did the testator say?" why should

the Court look at the circumstances that he lived with Charles, and was on bad terms with William? How can any amount of evidence to show that the testator intended to write "Charles" show that what he did write means "Charles"? To say that "Forster" means "Charles," is like saying that "two" means "three." If the question is, "What did the testator wish?" why should the Court refuse to look at his declarations of intention? And what third question can be asked? The only one which can be suggested is, "What would the testator have meant if he had deliberately used unmeaning words?" The only answer to this would be, he would have had no meaning, and would have said nothing, and his bequest should be *pro tanto* void.

NOTE XXXIV.

(To ARTICLE 92.)

See 2 Ph. Ev. 364; Star. 726; T. E. (from Greenleaf), s. 1051; {1 Greenl. Ev. § 279.} Various cases are quoted by these writers in support of the first part of the proposition in the article; but R. *v.* Cheadle is the only one which appears to me to come quite up to it. They are all settlement cases.

NOTE XXXV.

(To CHAPTER XIII.)

In this and the following chapter many matters usually introduced into treatises on evidence are omitted, because they appear to belong either to the subject of pleading, or to different branches of Substantive Law. For instance, the rules as to the burden of proof of negative averments in criminal cases (1 Ph. Ev. 555, &c.; 3 Russ. on Cr. 276–279) belong rather to criminal procedure than to evidence. Again, in every branch of Substantive Law there are presumptions, more or less numerous and important,

nearly the only rules of evidence treated of in the older authorities. Great part of Bentham's "Rationale of Judicial Evidence" is directed to an exposure of the fundamentally erroneous nature of the theory upon which these rules were founded; and his attack upon them has met with a success so nearly complete that it has itself become obsolete. The history of the subject is to be found in Mr. Best's work, book i. part i. ch. ii. ss. 132–188; {1 Greenl. Ev. §§ 386 *et seq.*} See, too, T. E. 1210–1257, and R. N. P. 177–181. As to the old law, see 1 Ph. Ev. 1–104.

NOTE XL.

(To ARTICLE 107.)

The authorities for the first paragraph are given at great length in Best, ss. 146–165. See, too, T. E. s. 1240; {1 Greenl. Ev. §§ 365 *et seq.*} As to paragraph 2, see Best, s. 148; 1 Ph. Ev. 7; 2 Ph. Ev. 457; T. E. s. 1241. The concluding words of the last paragraph are framed with reference to the alteration in the law as to the competency of witnesses made by 32 & 33 Vict. c. 68, s. 4. The practice of insisting on a child's belief in punishment in a future state for lying as a condition of the admissibility of its evidence leads to anecdotes and to scenes little calculated to increase respect either for religion or for the administration of justice. The statute referred to would seem to render this unnecessary. If a person who deliberately and advisedly rejects all belief in God and a future state is a competent witness, *à fortiori*, a child who has received no instructions on the subject must be competent also.

NOTE XLI.

(To ARTICLE 108.)

At Common Law the parties and their husbands and wives were incompetent in all cases. This incompetency

was removed as to the parties in civil, but not in criminal cases, by 14 & 15 Vict. c. 99, s. 2; and as to their husbands and wives, by 16 & 17 Vict. c. 83, ss. 1, 2. But sec. 2 expressly reserved the Common Law as to criminal cases and proceedings instituted in consequence of adultery.

The words relating to adultery were repealed by 32 & 33 Vict. c. 68, s. 3, which is the authority for the next article.

Persons interested and persons who had been convicted of certain crimes were also incompetent witnesses, but their incompetency was removed by 6 & 7 Vict. c. 85.

The text thus represents the effect of the Common Law as varied by four distinct statutory enactments.

By 5 & 6 Will. IV. c. 50, s. 100, inhabitants, &c., were made competent to give evidence in prosecutions of parishes for non-repair of highways, and this was extended to some other cases by 3 & 4 Vict. c. 26. These enactments, however, have been repealed by 37 & 38 Vict. c. 35, and c. 96 (the Statute Law Revision Acts, 1874), respectively. Probably this was done under the impression that the enactments were rendered obsolete by 14 & 15 Vict. c. 99, s. 2, which made parties admissible witnesses. A question might be raised upon the effect of this, as sec. 3 expressly excepts criminal proceedings, and a prosecution for a nuisance is such a proceeding. The result would seem to be, that in cases as to the repair of highways, bridges, &c., inhabitants and overseers are incompetent, unless, indeed, the Courts should hold that they are substantially civil proceedings, as to which see R. *v.* Russell, 3 E. & B. 942.

NOTE XLII.

(To Article 111.)

The cases on which these articles are founded are only Nisi Prius decisions; but as they are quoted by writers of

eminence ({1 Greenl. Ev. § 249;} 1 Ph. Ev. 139; T. E. s. 859), I have referred to them.

In the trial of Lord Thanet, for an attempt to rescue Arthur O'Connor, Serjeant Shepherd, one of the special commissioners, before whom the riot took place in court at Maidstone, gave evidence, R. *v.* Lord Thanet, 27 S. T. 836.

I have myself been called as a witness on a trial for perjury to prove what was said before me when sitting as an arbitrator. The trial took place before Mr. Justice Hayes at York, in 1869.

As to the case of an advocate giving evidence in the course of a trial in which he is professionally engaged, see several cases cited and discussed in Best, ss. 184–186.

In addition to those cases, reference may be made to the trial of Horne Tooke for a libel in 1777, when he proposed to call the Attorney-General (Lord Thurlow), 20 S. T. 740. These cases do not appear to show more than that, as a rule, it is for obvious reasons improper that those who conduct a case as advocates should be called as witnesses in it. Cases, however, might occur in which it might be absolutely necessary to do so. For instance, a solicitor engaged as an advocate might, not at all improbably, be the attesting witness to a deed or will.

NOTE XLIII.

(To ARTICLE 115.)

This article sums up the rule as to professional communications, every part of which is explained at great length, and to much the same effect. {1 Greenl. Ev. § 237 *et seq.*;} 1 Ph. Ev. 105–122; T. E. ss. 832–839; Best, s. 581. It is so well established and so plain in itself that it requires only negative illustrations. It is stated at length by Lord Brougham in Greenough *v.* Gaskell, 1 M. & K. 98.

NOTE XLIV.

(To ARTICLE 117.)

The question whether clergymen, and particularly whether Roman Catholic priests, can be compelled to disclose confessions made to them professionally has never been solemnly decided in England, though it is stated by the text writers that they can. {1 Greenl. Ev. § 247.} See 1 Ph. Ev. 109; T. E. ss. 837–838; R. N. P. 190; Starkie, 40. The question is discussed at some length in Best, ss. 583–584; and a pamphlet was written to maintain the existence of the privilege by Mr. Baddeley in 1865. Mr. Best shows clearly that none of the decided cases are directly in point, except Butler *v.* Moore (MacNally, 253–254), and possibly R. *v.* Sparkes, which was cited by Garrow in arguing Du Barré *v.* Livette before Lord Kenyon (1 Pea. 108). The report of his argument is in these words: "The prisoner being a Papist, had made a confession before a Protestant clergyman of the crime for which he was indicted; and that confession was permitted to be given in evidence on the trial" (before Buller, J.), "and he was convicted and executed." The report is of no value, resting as it does on Peake's note of Garrow's statement of a case in which he was probably not personally concerned; and it does not appear how the objection was taken, or whether the matter was ever argued. Lord Kenyon, however, is said to have observed: "I should have paused before I admitted the evidence there admitted."

Mr. Baddeley's argument is in a few words, that the privilege must have been recognized when the Roman Catholic religion was established by law, and that it has never been taken away.

I think that the modern Law of Evidence is not so old as the Reformation, but has grown up by the practice of the Courts, and by decisions in the course of the last two centuries. It came into existence at a time when excep-

tions in favor of auricular confessions to Roman Catholic priests were not likely to be made. The general rule is that every person must testify to what he knows. An exception to the general rule has been established in regard to legal advisers, but there is nothing to show that it extends to clergymen, and it is usually so stated as not to include them. This is the ground on which the Irish Master of the Rolls (Sir Michael Smith) decided the case of Butler *v.* Moore in 1802 (MacNally, Ev. 253–254). It was a demurrer to a rule to administer interrogatories to a Roman Catholic priest as to matter which he said he knew, if at all, professionally only. The Judge said, "It was the undoubted legal constitutional right of every subject of the realm who has a cause depending, to call upon a fellow-subject to testify what he may know of the matters in issue; and every man is bound to make the discovery, unless specially exempted and protected by law. It was candidly admitted, that no special exemption could be shown in the present instance, and analagous cases and principles alone were relied upon." The analogy, however, was not considered sufficiently strong.

Several judges have, for obvious reasons, expressed the strongest disinclination to compel such a disclosure. Thus Best, C. J., said, "I, for one, will never compel a clergyman to disclose communications made to him by a prisoner; but if he chooses to disclose them I shall receive them in evidence (*obiter*, in Broad *v.* Pitt, 3 C. & P. 518). Alderson, B., thought (rather it would seem as a matter of good feeling than as a matter of positive law) that such evidence should not be given. R. *v.* Griffin, 6 Cox, Cr. Ca. 219.

NOTE XLV.

(To ARTICLES 126, 127, 128.)

These articles relate to matters almost too familiar to require authority, as no one can watch the proceedings of

any Court of Justice without seeing the rules laid down in them continually enforced. The subject is discussed at length in 2 Ph. Ev. pt. 2, chap. x. p. 456, &c.; {1 Greenl. Ev. § 431 *et seq.*;} T. E. s. 1258, &c.; see, too, Best, s. 631, &c. In respect to leading questions, it is said "It is entirely a question for the presiding judge whether or not the examination is being conducted fairly:" R. N. P. 182.

NOTE XLVI.

(To ARTICLE 129.)

This article states what is now the well-established practice of the Courts, and it never was more strikingly illustrated than in the case referred to in the illustration. But the practice which it represents is modern; and it may perhaps be doubted whether upon solemn argument it would be held that a person who is called to prove a minor fact, not really disputed, in a case of little importance, thereby exposes himself to having every transaction of his past life, however private, inquired into by persons who may wish to serve the basest purposes of fraud or revenge by doing so. Suppose, for instance, a medical man were called to prove the fact that a slight wound had been inflicted, and been attended to by him, would it be lawful, under pretence of testing his credit, to compel him to answer upon oath a series of questions as to his private affairs, extending over many years, and tending to expose transactions of the most delicate and secret kind, in which the fortune and character of other persons might be involved? If this is the law, it should be altered. The following section of the Indian Evidence Act (1 of 1872) may perhaps be deserving of consideration. After authorizing, in sec. 147, questions as to the credit of the witness, the Act proceeds as follows in sec. 148:—

"If any such question relates to a matter not relevant to the suit or proceeding, except in so far as it affects the credit of the witness by injuring his character, the Court shall decide whether or not the witness shall be compelled to answer it, and may, if it thinks fit, warn the witness that he is not obliged to answer it. In exercising this discretion, the Court shall have regard to the following considerations:—

"(1) Such questions are proper if they are of such a nature that the truth of the imputation conveyed by them would seriously affect the opinion of the Court as to the credibility of the witness on the matter to which he testifies.

"(2) Such questions are improper if the imputation which they convey relates to matters so remote in time or of such a character that the truth of the imputation would not affect, or would affect in a slight degree, the opinion of the Court as to the credibility of the witness on the matter to which he testifies.

"(3) Such questions are improper if there is a great disproportion between the importance of the imputation made against the witness's character and the importance of his evidence."

NOTE XLVII.

(TO ARTICLE 131.)

The words of the two sections of 17 & 18 Vict. c. 125, meant to be represented by this article are as follows:—

22. A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character; but he may, in case the witness shall, in the opinion of the judge, prove adverse, contradict him by other evidence, or, by leave of the judge, prove that he has made at other times a statement inconsistent with his present testimony; but before such last-mentioned proof

can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement.

23. If a witness, upon cross-examination as to a former statement made by him relative to the subject-matter of the cause, and inconsistent with his present testimony, does not distinctly admit that he made such statement, proof may be given that he did in fact make it; but before such proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement.

The sections are obviously ill-arranged; but apart from this, s. 22 is so worded as to suggest a doubt whether a party to an action has a right to contradict a witness called by himself whose testimony is adverse to his interests. The words "he may, in case the witness shall, in the opinion of the judge, prove adverse, contradict him by other evidence," suggest that he cannot do so unless the judge is of that opinion. This is not, and never was, the law. In Greenough *v.* Eccles, 5 C. B. N. S. p. 802, Williams, J., says: "The law was clear that you might not discredit your own witness by general evidence of bad character; but you might, nevertheless, contradict him by other evidence relevant to the issue;" and he adds (p. 803): "It is impossible to suppose that the Legislature could have really intended to impose any fetter whatever on the right of a party to contradict his own witness by other evidence relevant to the issue — a right not only established by authority, but founded on the plainest good sense."

Lord Chief Justice Cockburn said of the 22d section: "There has been a great blunder in the drawing of it, and on the part of those who adopted it." . . . "Perhaps the better course is to consider the second branch

of the section as altogether superfluous and useless (p. 806)." On this authority I have omitted it.

For many years before the Common-Law Procedure Act of 1854 it was held, in accordance with Queen Caroline's Case (2 Br. & Bing. 286–291), that a witness could not be cross-examined as to statements made in writing, unless the writing had been first proved. The effect of this rule in criminal cases was that a witness could not be cross-examined as to what he had said before the magistrates without putting in his deposition, and this gave the prosecuting counsel the reply. Upon this subject rules of practice were issued by the judges in 1837, when the Prisoner's Counsel Act came into operation. The rules are published in 7 C. & P. 676. They would appear to have been superseded by the 28 Vict. c. 18.

NOTE XLVIII.

The Statute Law relating to the subject of evidence may be regarded either as voluminous or not, according to the view taken of the extent of the subject.

The number of statutes classified under the head "Evidence" in Chitty's Statutes is 35. The number referred to under that head in the Index to the Revised Statutes is 39. Many of these, however, relate only to the proof of particular documents, or matters of fact which may become material under special circumstances.

Of these I have noticed a few which, for various reasons, appeared important. Such are: 34 & 35 Vict. c. 112, s. 19 (see article 11); 9 Geo. IV. c. 14, s. 1, amended by 19 & 20 Vict. c. 97, s. 13 (see article 17); 9 Geo. IV. c. 14, s. 3; 3 & 4 Will. IV. c. 42 (see article 28); 11 & 12 Vict. c. 42, s. 17 (article 33); 30 & 31 Vict. c. 35, s. 6 (article 34); 7 James I. c. 12 (article 38); 7 & 8 Geo. IV. c. 28, s. 11, amended by 6 & 7 Will. IV. c. 111; 24 & 25

Vict. c. 96, s. 116; 24 & 25 Vict. c. 90, s. 37 (see article 56); 8 & 9 Vict. c. 10, s. 6; 35 & 36 Vict. c. 6, s. 4 (article 121); 7 & 8 Will. III. c. 3, ss. 2–4; 39 & 40 Geo. III. c. 93 (article 122).

Many, again, refer to pleading and practice rather than evidence, in the sense in which I employ the word. Such are the Acts which enable evidence to be taken on commission if a witness is abroad, or relate to the administration of interrogatories.

Those which relate directly to the subject of evidence, as defined in the Introduction, are the ten following Acts:—

1.

46 Geo. III. c. 37 (1 section; see article 120). This Act qualifies the rule that a witness is not bound to answer questions which criminate himself by declaring that he is not excused from answering questions which fix him with a civil liability.

2.

6 & 7 Vict. c. 85. This Act abolishes incompetency from interest or crime (4 sections; see article 106).

3.

8 & 9 Vict. c. 113: "An Act to facilitate the admission in evidence of certain official and other documents" (8th August, 1845; 7 sections).

S. 1, after preamble reciting that many documents are, by various Acts, rendered admissible in proof of certain particulars if authenticated in a certain way, enacts *inter alia* that proof that they were so authenticated shall not be required if they purport to be so authenticated. (Article 79.)

S. 2. Judicial notice to be taken of signatures of certain judges. (Article 58, latter part of clause 8.)

S. 3. Certain Acts of Parliament, proclamations, &c.,

may be proved by copies purporting to be Queen's printer's copies. (Article 81.)

S. 4. Penalty for forgery, &c. This is omitted as belonging to the Criminal Law.

Ss. 5, 6, 7. Local extent and commencement of Act.

4.

14 & 15 *Vict.* c. 99: "An Act to amend the Law of Evidence," 7th August, 1851 (20 sections):—

S. 1 repeals part of 6 & 7 Vict. c. 85, which restricted the operation of the Act.

S. 2 makes parties admissible witnesses, except in certain cases. (Effect given in articles 106 & 108.)

S. 3. Persons accused of crime, and their husbands and wives, not to be competent. (Article 108.)

S. 4. The first three sections not to apply to proceedings instituted in consequence of adultery. Repealed by 32 & 33 Vict. c. 68. (Effect of repeal, and of s. 3 of the last-named Act given in article 109.)

S. 5. None of the sections above mentioned to affect the Wills Act of 1838, 7 Will. IV. & 1 Vict. c. 26. (Omitted as part of the Law of Wills.)

S. 6. The Common-Law Courts authorized to grant inspection of documents. (Omitted as part of the Law of Civil Procedure.)

S. 7. Mode of proving proclamations, treaties, &c. (Article 84.)

S. 8. Proof of qualification of apothecaries. (Omitted as part of the law relating to medical men.)

Ss. 9, 10, 11. Documents admissible either in England or in Ireland, or in the colonies, without proof of seal, &c., admissible in all. (Article 80.)

S. 12. Proof of registers of British ships. (Omitted as part of the law relating to shipping.)

S. 13. Proof of previous convictions. (Omitted as belonging to Criminal Procedure.)

S. 14. Certain documents provable by examined copies, or copies purporting to be duly certified. (Article 79, last paragraph.)

S. 15. Certifying false documents a misdemeanor. (Omitted as belonging to Criminal Law.)

S. 16. Who may administer oaths. (Article 125.)

S. 17. Penalties for forging certain documents. (Omitted as belonging to the Criminal Law.)

S. 18. Act not to extend to Scotland. (Omitted.)

S. 19. Meaning of the word "Colony." (Article 80, note 1.)

S. 20. Commencement of Act.

5.

17 & 18 *Vict. c.* 125. The Common-Law Procedure Act of 1854 contained several sections which altered the Law of Evidence.

S. 22. How far a party may discredit his own witness. (Articles 131, 133; and see Note XLVII.)

S. 23. Proof of contradictory statements by a witness under cross-examination. (Article 131.)

S. 24. Cross-examination as to previous statements in writing. (Article 132.)

S. 25. Proof of a previous conviction of a witness may be given. (Article 130 (1).)

S. 26. Attesting witnesses need not be called unless writing requires attestation by law. (Article 72.)

S. 27. Comparison of disputed handwritings. (Articles 49 and 52.)

After several Acts, giving relief to Quakers, Moravians, and Separatists, who objected to take an oath, a general measure was passed for the same purpose in 1861.

6.

24 & 25 *Vict. c.* 66 (1st August, 1861, 3 sections):—

S. 1. Persons refusing to be sworn from conscientious

motives may make a declaration in a given form. (Article 123.)

S. 2. Falsehood upon such a declaration punishable as perjury. (Do.)

S. 3. Commencement of Act.

7.

28 *Vict.* c. 18 (9th May, 1865, 10 sections):—

S. 1. Sections 3–8 to apply to all courts and causes, criminal as well as civil.

S. 3. Re-enacts 17 & 18 Vict. c. 125, s. 22.
S. 4. „ „ „ s. 23.
S. 5. „ „ „ s. 24.
S. 6. „ „ „ s. 25.
S. 7. „ „ „ s. 26.
S. 8. „ „ „ s. 27.

The effect of these sections is given in the articles above referred to by not confining them to proceedings under the Common-Law Procedure Act, 1854.

The rest of the Act refers to other subjects.

8.

31 & 32 *Vict.* c. 37 (25th June, 1868, 6 sections):—

S. 1. Short title.

S. 2. Certain documents may be proved in particular ways. (Art. 83, and for schedule referred to see note to the article.)

S. 3. The Act to be in force in the colonies. (Article 83.)

S. 4. Punishment of forgery. (Omitted as forming part of the Criminal Law.)

S. 5. Interpretation clauses embodied (where necessary) in article 83.

S. 6. Act to be cumulative on Common Law. (Implied in article 73.)

9.

32 & 33 *Vict. c.* 68 (9th August, 1869, 6 sections):—

S. 1. Repeals part of 14 & 15 Vict. c. 99, s. 4, and part of 16 & 17 Vict. c. 83, s. 2. (The effect of this repeal is given in article 109; and see Note XLI.)

S. 2. Parties competent in actions for breach of promise of marriage, but must be corroborated. (See articles 106 and 121.)

S. 3. Husbands and wives competent in proceedings in consequence of adultery, but not to be compelled to answer certain questions. (Article 109.)

S. 4. Atheists rendered competent witnesses. (Articles 106 and 123.)

S. 5. Short title.

S. 6. Act does not extend to Scotland.

10.

33 & 34 *Vict. c.* 49 (9th August, 1870, 3 sections):—

S. 1. Recites doubts as to meaning of "Court" and "Judge" in s. 4 of 32 & 33 Vict. c. 68, and defines the meaning of those words. (The effect of this provision is given in the definitions of "Court" and "Judge" in article 1, and in s. 125.)

S. 2. Short title.

S. 3. Act does not extend to Scotland.

These are the only Acts which deal with the Law of Evidence as I have defined it. It will be observed that they relate to three subjects only — the competency of witnesses, the proof of certain classes of documents, and certain details in the practice of examining witnesses. These details are provided for twice over, namely, once in 17 & 18 Vict. c. 125, ss. 22–27, both inclusive, which concern civil proceedings only; and again in 28 Vict. c. 18, ss. 3–8, which re-enact these provisions in relation to proceedings of every kind.

Thus, when the Statute Law upon the subject of Evidence is sifted and put in its proper place as part of the general system, it appears to occupy a very subordinate position in it. The ten statutes above mentioned are the only ones which really form part of the Law of Evidence, and their effect is fully given in twenty[1] articles of the Digest, some of which contain other matter besides.

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[1] 1, 49, 52, 58, 72, 79, 80, 81, 88, 84, 106, 108, 109, 120, 121, 123, 125, 131, 132, 133.

INDEX.

Accomplice, evidence of, 177.
Acts of Parliament, not public, how proved, 133.
————————, public, how proved, 133.
"Admission," definition of, 65.
———————— by one joint contractor in writing not binding on remainder to bar Statute of Limitations, 68.
———————— by partners and joint contractors, 68; *illustration of*, 69.
———————— by persons having a common interest, 68; *illustration of*, 69.
———————— by person referred to by party, 71; *illustration of*, 71.
———————— cannot be made in criminal cases, 117.
———————— made under duress, 72.
———————— made without prejudice, 72.
————————, principal not agent of surety to make, 68; *illustration of*, 70.
————————, statement by agent when not, 68; *illustration of*, 70.
————————, statement made by person interested in action, or privy, when, 66; *illustration of*, 67.
————————, statement of person sued in a representative character when, 66.
Admissions by agents, 66; *illustrations of*, 67.
———————— by barrister or solicitor, 67.
———————— by strangers to action when relevant, 71.
———————— by whom, may be made, 64; *illustrations of*, 66.
————————, statements by barrister or solicitor when not, 67.
Advocates privileged as to certain questions, 168.
Affirmation and declaration in place of oath, form of, 179.

Bankers' books, judges' powers as to, 93.
Bills of lading, 165.
Bodily feeling, acts showing, relevant, 57.
————————, statements showing, relevant, 57.

Certified copies of documents admissible, 131, 132.
Character as affecting damages in civil cases generally irrelevant, 112.

Character, evidence of general reputation and not of particular acts may be given, 112.
————, generally irrelevant, 111.
————, good, when evidence given of, in particular cases, previous convictions may be proved, 112.
———— in criminal proceedings when relevant, 111.
Clergymen compelled to disclose confidential communications, 173.
Communications during marriage privileged, 168.
Complaint of person against whom crime committed, fact of, relevant, but terms not, 51; *illustration of*, 52.
"Conclusive proof," definition of, 86.
Conduct of person against whom crime committed, relevancy of facts showing, 51; *illustration of*, 51.
"Confession," definition of, 72.
————, facts discovered in consequence of, though improperly obtained, relevant, 78; *illustration of*, 74.
———— made by accused person without warning, 76.
———— made in consequence of deception, relevancy of, 76.
———— made under promise of secrecy, relevancy of, 76.
———— made when drunk, relevancy of, 76.
———— to persons in authority, 72.
———— when impression produced by threat, inducement, or promise is removed, 73; *illustration of*, 74.
———— when made as a religious duty, 72; *illustration of*, 73.
———— when made by inducement collateral to the proceeding, 72; *illustration of*, 73.
———— when made to a person not in authority, 72; *illustration of*, 73.
———— when not deemed voluntary, 72; *illustration of*, 73.
———— when relevant, 72; *illustration of*, 73.
Confessions made on oath when relevant, 75; *illustration of*, 76.
———— made on oath when witness improperly compelled to answer, 75.
Conspirators, acts of, 46.
————, judge must be satisfied of primâ facie case against, 46.
————, relevancy of facts as against, 46; *illustration of*, 46.
Copies of documents when equivalent to exemplifications, 131.
Corroboration of mother of bastard child required, 177.
———— of plaintiff required in breach of promise of marriage, 176.
———— required when evidence given by accomplice, 177.
Course of business, relevancy of, 63; *illustrations of*, 63.
Credit of witness, impeaching, 189.
Cross-examination of witnesses, 183.

Cross-examination, to what must be directed, 184.
————————, questions lawful in, 185; *illustration of*, 185.
———————— as to inconsistent statements, 187.
———————— as to statements in writing, 189.
Custom, relevancy of facts as to, 49; *illustrations of*, 49.

Death, presumption of, 159.
Declaration against interest, endorsement of payment on bond, 81.
———— against interest, endorsement of payment on bond by deceased person, 82.
———— against interest not relevant unless interest pecuniary or proprietary, 82; *illustration of*, 83.
———— against interest pecuniary or proprietary, relevancy of, 81.
———— against interest when not relevant, 81; *illustrations of*, 83.
———— against interest when relevant, 81; *illustrations of*, 83.
———— as to general right relevant when made by persons having means of knowledge, 85.
———— as to public right relevant by whomever made, 85.
———— by testator as to contents of will relevant, 84.
————, dying, as to cause of death, when relevant, 77; *illustrations of*, 78.
————, dying, not irrelevant because intended to be made as deposition, 77; *illustration of*, 78.
———— irrelevant except made in ordinary course of business or duty, 79; *illustrations of*, 80.
———— made in course of business, relevancy of, 79; *illustrations of*, 80.
———— made in discharge of professional duty, relevancy of, 79; *illustrations of*, 80.
———— when oath not binding, form of, 179.
Declarations as to facts from which public rights may be inferred not relevant, 85; *illustration of*, 86.
———— as to pedigree when relevant, 87.
———— by whom to be made, 87.
———— conditions under which they are to be made, 87, 88; *illustrations of*, 88.
———— as to public or general rights relevant, 85; *illustrations of*, 86.
———— relevant under Articles 25–33, what may be proved in reference to, 191.
Definition of terms, 35.
Depositions before magistrates, when relevant, 194.
———— when irrelevant, 194.
———— judge may reject, and postpone trial, 195.

Depositions, same objection may be made to reading, as when originally taken, 194.
———— under Merchant Shipping Act, 1854, when admissible, 196, 197; how to be taken, 197.
———— under 30 & 31 Vict. c. 35, s. 6, when admissible, 195.
"Document," definition of, 35.
————, date of, presumption as to, 138; *illustrations of*, 138.
————, person other than party to, may prove fact not varying or altering right or liability, 150; *illustrations of*, 151.
————, public, may be proved by examined copy, 129.
————, stamp of, presumption as to, 139.
———— used to refresh memory, 191.
————, using, as evidence when production refused on notice, 193.
———— when called for and produced and inspected must be given in evidence if party producing requires it, 193.
"Documentary evidence," definition of, 36.
———————— of contracts, 142.
———————— cannot be varied by oral evidence, 142.
————————, exceptions, 142, 143; *illustrations of*, 144.
Documents admissible throughout the Queen's dominions, 132.
————, certified copies of, admissible, 131, 132.
————, construction of, what evidence may be given, 146, 147; *illustrations of*, 148, 149.
————, contents of, when irrelevant, 64.
————, how proved by primary evidence, 121.
————, notice to produce, rules as to, 127.
———— not required by law to be attested, proof of, 124.
————, persons entitled to refuse production of, not compelled to give evidence of contents, 174.
————, presumption as to alteration of, 140.
————, production of, when another could refuse to produce, 174.
————, proof of execution of, when required to be attested, 121, 122.
————, proof of, must be by primary evidence, 121.
————, exceptions, 122.
————, proof of, when attesting witness denies execution, 124.
————, proof of, when attesting witness need not be called, 122.
————, public, proof of, 129.
————, public, proved by production from proper custody, 129.

Documents thirty years old, presumption as to, 139.
————, when secondary evidence of contents may be given, 125, 128.

Entries in bankers' books, when relevant, 92; exceptions to, 93.
Entry in public record made in performance of duty relevant, 91.
Estoppel by conduct, 161; *illustrations of*, 162, 163.
———— of acceptor of bill of exchange, 164.
———— of bailee, agent, and licensee, 164.
———— of tenant or licensee, 163.
"Evidence," definition of, 35.
————— as to affairs of state, 169.
————, false, on affirmation or declaration punishable as perjury, 180.
————, improper admission of, 198.
————, improper rejection of, 198.
————— in former proceedings when relevant, 89.
————, conditions under which it may be given, 89.
————— need not be given of admitted facts, 117.
————, oral, how taken, 179.
————, oral, may be taken before an examiner, 180.
————, oral, may be taken on affidavit, 181.
————, oral, may be taken under a commission, 181.
————, oral, must be direct, 119.
————, oral, not excluded by a documentary memorandum of fact, 144.
————, oral, reduced to writing, when may be objected to, 182.
————, proof of facts by oral, 119.
————— to be on oath, or affirmation and declaration, 179.
"Evidence, secondary," definition of, 124.
Examination of witnesses, 182.
Examined copy of public document, what is, 129.
Exemplifications, what are, 130.
Experts, facts bearing on opinions of, 106; *illustrations of*, 106, 107.
————, opinions of, on points of science and art, 104.

"Fact," definition of, 35.
——— that particular person held particular office when relevant, 64.
"Facts in issue," definition of, 36.
——— in issue and relevant to issue may be proved, 41; *illustration of*, 43.
——— necessary to introduce or explain relevant facts, relevancy of, 52; *illustrations of*, 53, 54.

Facts necessary to support or rebut an inference suggested by fact in issue, relevancy of, 52; *illustrations of*, 53, 54.
——— of which Court takes judicial notice, 114–116.
——— of which Court takes judical notice need not be proved, 116.
——— relevant to facts in issue may be proved, 41; *illustration of*, 43.
——— showing system, relevancy of, 61; *illustrations of*, 62.
——— similar to but unconnected with the facts in issue when relevant, 55; *illustrations of*, 55.
——— supporting or contradicting opinions of experts relevant, 106; *illustrations of*, 107.
——— too remote may be excluded by judge, 41.
——— which establish identity of any thing or person, relevancy of, 53; *illustration of*, 53.
——— which fix time or place at which any fact in issue or relevant happened, relevancy of, 53; *illustration of*, 53.
——— which show genuineness of document produced, relevancy of, 53; *illustration of*, 53.
——— which show opportunity, relevancy of, 53; *illustration of*, 53.
——— which show relation of parties, relevancy of, 53; *illustration of*, 53.
——— which show relevancy of other facts, relevancy of, 53.
Foreign and Colonial Acts of State, how proved, 135, 136.
——— judgments, same rules apply to such, as can be enforced by law in this country, 102.

General right common to considerable number of persons, 85.
Good faith, acts showing, relevant, 56; *illustrations of*, 58.
———, statements showing, relevant, 56.

Handwriting, comparison of disputed, with genuine, 108.
———, opinion as to, 107.
———, when person deemed acquainted with, 107; *illustrations of*, 108.
Hearsay irrelevant, 64; *illustrations of*, 64.
Husbands and wives, when competent witnesses in proceedings relating to adultery, 168.

Information as to the commission of offences, 169.
Intention, acts showing, relevant, 56; *illustrations of*, 58.
———, statements showing, relevant, 56.

Journals of Houses of Parliament, how proved, 133.
"Judge," definition of, 35.
——— may exclude facts too remote, 41.

Judges privileged as to certain questions, 168.
"Judgment," definition of, 94.
———— conclusive when party had no opportunity of pleading it as an estoppel, 99; *illustrations of*, 99.
———— not pleaded as estoppel relevant but not conclusive, 98; *illustration of*, 99.
———— offered as evidence may be proved to be procured by fraud, 101.
———— offered as evidence may be proved to have been reversed, 102.
———— that Court had no jurisdiction, 101.
Judgments conclusive in favor of judge, 101; *illustration of*, 101.
———— conclusive proof, 94; *illustrations of*, 95
————, statements in, when irrelevant, 97; *illustration of*, 98; conclusive except in Courts of Admiralty condemning ship as prize, 97; *illustrations of*, 98.
———— when conclusive between parties and privies, 96; *illustrations of*, 96, 97.
———— when irrelevant between strangers, 97; *illustration of*, 98, 100.
———— between parties and privies where issue different, 99; *illustration of*, 100.
———— in favor of strangers against parties and privies, 99; *illustration of*, 100.
———— except as being an admission, or if it relates to a matter of public or general interest, 100; *illustration of*, 101.
Judicial notice, facts need not be proved of which Court takes, 116.
———— facts of which Court takes, 114–116.
Jurors not competent to give evidence, 170.

Knowledge, acts showing, relevant, 57; *illustration of*, 58.
————, statements showing, relevant, 57.

Leading questions, 184.
Legitimacy, when presumed, 158.

Magistrates, depositions before, 194.
Malice, acts showing, relevant, 56; *illustration of*, 58.
———, statements showing, relevant, 56.
Marriage, communications during, 168.
————, opinion as to existence of, 108.
————, opinion as to validity of, 108.

Medical men compelled to disclose confidential communications, 178.
Merchant Shipping Act, definitions under, 196, 197.
Motive, relevancy of facts supplying, 49; *illustrations of*, 49.

Notice to produce, rules as to, 127.

Oaths, by whom they may be administered, 180.
———, form of, 179.
———, when binding, 179.
Offences against women, what evidence is relevant, 190.
Opinion as to existence of marriage relevant, 108; not to prove bigamy or proceedings for divorce, 108.
——— when relevant, grounds of, relevant, 109; *illustration of*, 110.
Opinions as to handwriting relevant when made by person acquainted with writing of supposed writer, 107.
——— duty of judge to decide whether person offering, is an expert, 104.
——— generally irrelevant, 103; *illustration of*, 103.
——— of experts as to existence of facts on which opinion founded, irrelevant, 105; *illustration of*, 106.
——— of experts as to foreign laws relevant, 104.
——— of experts in matters of science or art relevant, 104; *illustrations of*, 105.

Perjury, number of witnesses, 178.
——— on declaration or affirmation, 180.
Preparation, relevancy of facts constituting, 49; *illustrations of*, 49.
"Presumption," definition of, 36.
——— as to alteration of document, 140.
——— as to date of document, 138; *illustrations of*, 138.
——— as to documents thirty years old, 139.
——— as to sealing and delivery of deeds, 139.
——— as to stamp of document, 139.
——— of death from seven years' absence, 159.
——— of execution of deeds to complete title, 161.
——— of innocence, 152; *illustrations of*, 153.
——— of legitimacy, 158.
——— of lost grant, 160; *illustrations of*, 160, 161.
——— of regularity of judicial or official acts, 161.
——— that alterations in deed made before completed, 141.
——— that alterations in will made after execution, 141.
——— that alteration of deed not under seal would not constitute offence, 141.

Previous conviction, proof of, when relevant in cases of possession of stolen goods, 57, 58.
Proclamations and orders in council issued by her Majesty in the Privy Council, how proved, 134, 135.
————, orders, or regulations issued by certain departments of the Government, how proved, 134, 135.
Professional communications, when privileged, 170; *illustrations of*, 171.
Proof, burden of, as to particular fact, 155; *illustrations of*, 156.
———, burden of, lies on him who affirms, 152.
———, burden of, of fact to be proved to make evidence admissible, 157; *illustrations of*, 157.
———, burden of, on whom it lies, 153; *illustrations of*, 154.
Public right common to all her Majesty's subjects, 85.
Records under charge of the Master of the Rolls may be proved by certified copy, 130.
Refreshing memory by document, when admissible, 191.
"Relevancy," definition of, 36.
Relevancy of facts forming part of the same transaction as facts in issue, 43; *illustrations of*, 44.
"Relevant," definition of, 36.
Royal proclamation, how proved, 134.

State of body, acts showing, relevant, 57.
————, statements showing, relevant, 57.
State of mind, acts showing, relevant, 57.
————, statements showing, relevant, 57.
Statement of Act of State or fact of public nature when relevant, 90.
————, relevancy of, accompanying or explaining act, 51; *illustrations of*, 52.
Statements by deceased persons, relevancy of, 77.
———— causing state of mind, relevancy of, 56.
———— inconsistent with testimony may be proved if desired by witness, 187.
———— in works of history, maps, charts, and plans relevant when they relate to matters of general public interest, 91; irrelevant when they relate to private matters, 91.
———— made in presence of person whose conduct in issue are relevant, 51.
———— presenting state of mind, relevancy of, 56.
Statute of Limitations, endorsement on memorandum or promissory note of a payment does not exclude, 82.
————————, declaration by deceased person to whom payment is made will exclude operation of, 82.

Statutes, Irish, how proved, 133.
Stolen goods, possession of, relevancy of, 57; *illustration of*, 58.
Subsequent conduct of person accused, relevancy of facts showing, 49; *illustrations of*, 49.

"Terms," definition of, 35.
Title, relevancy of facts as to, 48; *illustrations of*, 48.
Treason, 177.
———, number of witnesses, 177.

Witness cannot be contradicted as to credit generally, 186.
———, cross-examination of, 182.
———, cross-examination of, as to previous statements in writing, 189.
———, deaf and dumb, not incompetent, but may give evidence by writing or signs in court, 166.
——— dying or becoming incapable, evidence given by, good, 183.
———, examination of, 182.
———, examination of, must be directed to relevant facts, 184.
——— found to be incompetent, evidence may be withdrawn, 183.
———, husbands and wives when competent witnesses in proceedings relating to adultery, 167.
———, husband or wife when competent, 167.
———, husband or wife when incompetent, 167.
——— may be contradicted to show conviction of felony or misdemeanor, 186; to show that he is not impartial, 186.
——— may be cross-examined as to credit, 185.
——— may be cross-examined as to veracity, 185.
——— may not be asked leading questions in examination in chief or re-examination, 185.
——— not bound to criminate himself, 174.
——— not party to suit not compelled to produce his title-deeds, 173.
——— not party to suit when not compelled to produce document, 173.
——— not party to suit when not entitled to refuse to produce document, 173.
——— producing document on a subpœna not subject to cross-examination, 183.
———, re-examination of, must be confined to facts referred to in cross-examination, 184.
——— refreshing memory, 191.
———, when, incompetent from youth or incapacity, 166.
———, when, may be cross-examined by party calling him, 188.

Witness, when, not entitled to refuse to produce document, 178.
Witnesses, number of, in high treason, 177.
————, number of, in high treason in compassing or imagining the Queen's death, 177.
————, number of, in perjury, 178.
Women, offences against, 190.

THE END.

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